KC LEGAL UPDATE

Autumn/Winter 2020

In this issue...

KEATING CHAMBERS

WELCOME

to the Autumn/Winter 2020 Edition of KC LEGAL UPDATE

Announcing Alexander Nissen QC as our New Head of Chambers

Keating Chambers are pleased to announce the appointment of Alexander Nissen QC as Head of Chambers, with effect from 4th November 2020. Alexander follows Marcus Taverner QC who has been leading the set since October 2015.

Alexander has been a member of Keating since 1989, was appointed Queens Counsel in 2006 and a Deputy High Court Judge in 2013. He sits in the TCC and is a former Chair of TECBAR. In addition, he has an active practice as counsel, arbitrator, mediator and adjudicator. Directories describe him as "unparalleled in his field" and a "super-leader who really gets into the detail". He will be assisted by three deputies.

Commenting on this appointment, Alexander said *"I would like to extend my thanks to Marcus for his hard work and dedication during his five-year term. I am honoured to succeed him in this role and to accept the position as Head of Chambers of such a prestigious and forward-thinking set. I take over at an unusual time, but all the signs are that, despite Covid 19, Chambers success will continue and that we will remain one of the leaders in the field."*

During his time as Head of Chambers, Marcus oversaw many key developments within the set, building on our long-standing success. He has been involved in:

- The expansion of our membership with lateral hires including Sean Wilken QC, Charles Banner QC, Rachael O'Hagan, Brenna Conroy, John McMillan and Charlie Thompson.
- A comprehensive rebrand including the launch of a new website and a top to bottom refurbishment of our premises on Essex Street.
- Continuing and widening the development of the international reputation of Keating in several jurisdictions including the Gulf, Hong Kong, Singapore, Korea, Australia, and South Africa.

This has led Keating to a number of industry award nominations in recent years, culminating in winning the Lexis Nexis 2020 "Chambers of the Year" in March and The Lawyer's prestigious "Chambers of the Year" award on his last day of service – a marker of the hard work he has put in with the Executive Committee during his five years as Head of Chambers.

Marcus remains a full member of Keating Chambers. To coincide with his end of term as Head of Chambers, he has decided to step back from advocacy in order to develop his burgeoning Arbitration practice. Commenting on his time as Head of Chambers, Marcus said: *"I have greatly enjoyed my time as Head of Chambers and would like to thank my deputies, the extended Executive Committee and all of the barristers and staff at Keating for helping to make the last five years such a success. I cannot think of a better person to hand the baton over to than Alexander."*

CEO and Director of Clerking, Declan Redmond, added: *"On behalf of all the staff at Keating Chambers I would like to express our gratitude to Marcus for the encouragement he has given us all over the past five years to help Chambers achieve the unquestionable success it has. We look forward to continuing to build on that success with Alexander at the helm."*

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APPROACH TO QUANTUM MERUIT FOLLOWING REPUDIATION OF A CONSTRUCTION CONTRACT: AUSTRALIA VS. THE UNITED KINGDOM

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Introduction

In this article, we will examine the Australian High Court's decision in *Mann v Paterson Constructions Pty Ltd*[1] (Mann v Paterson) relating to the use of quantum meruit following the repudiation of a construction contract. We will also briefly discuss how that decision compares to the current status of quantum meruit in the United Kingdom.

In its recent decision, the High Court of Australia has provided some clarity to an area of Australian law that has often been described as controversial: the ability to elect to seek a quantum meruit for repudiation of a building contract. Clarity from the High Court comes in two principle ways:

- clarification of the limited circumstances in which a contractor may now pursue a claim of quantum meruit; and
- clarification regarding the quantification of such a claim.

Relevantly, the case was in respect of domestic building works (construction of two townhouses) and was governed by relevant domestic building legislation.[2] The High Court held that the DBC Act applied to the facts at hand and, in particular, to the process which was legislatively required to be applied to variation works. Therefore, variation works were to be assessed in accordance with that legislation and recovery on a quantum meruit basis for the variations was prohibited. There may still be future work for Australian courts to do in order to reconcile the High Court's decision with variation works that are not covered by that or similar legislation.

The decision means that Australian construction contractors must pay close attention to their contracts (both in terms of negotiation and contract administration) as it will now be more difficult for them to avoid onerous contractual mechanisms (such as time bars and caps) by seeking a quantum meruit.

What is Quantum Meruit?

Quantum meruit is a legal doctrine which allows a contractor to claim restitution of a reasonable sum for work and/or services provided. The term quantum meruit translates to 'what one has earned' or, in practical terms, 'what the job is worth'.

A restitutionary claim for quantum meruit can generally arise in the following circumstances:

- there is no contract specifying a sum to be paid;
- there is an express agreement between the parties to pay a 'reasonable sum';
- work is undertaken outside of the contract, at the request of the principal; or
- work is undertaken under a contract which is later found to be void or unenforceable.

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"There has been significant debate as to whether and how the terms of a contract should form the outline or cap for any award in restitution in circumstances where one party had demonstrated its unwillingness to be bound by those terms so as to lead to the agreement's termination."

Previous Position in Australia

In Australia, prior to the *Mann v Paterson* decision, a contractor could, following its acceptance of an owner's repudiation of a contract, broadly elect to pursue its remedial rights through either contractual damages or a restitutionary claim for quantum meruit.

In some instances this produced seemingly odd results whereby a contractor could claim for, and receive amounts, on a quantum meruit basis for work performed that were significantly greater than the amounts it would have received had the contract remained on foot and been performed. This was due to the position that there was no 'cap' on the amount that the innocent party could claim for the works completed. This, in turn, raised important considerations for courts and commentators regarding the proper weight that should be given to negotiated and agreed contractual prices in assessing a quantum meruit claim.

In particular, there has been significant debate as to whether and how the terms of a contract should form the outline or cap for any award in restitution in circumstances where one party had demonstrated its unwillingness to be bound by those terms so as to lead to the agreement's termination. In this respect, the Victorian Court of Appeal in *Sopov v Kane Constructions Pty Ltd (No 2)*[3] noted the *"growing chorus of judicial and academic criticism of the availability of Quantum Meruit as an alternative to contract damages where repudiation is accepted"*. It further said that, had it not been constrained by authority, it may have accepted the claimant's argument that the respondent's only remedy was to sue on the contract.

The Facts of the Case

In March 2014, Mr and Mrs Mann (Owners) entered into a major domestic building contract with Paterson Constructions Pty Ltd (Contractor) for the construction of two double storey townhouses.

In April 2015, with one of the two townhouses completed, a dispute arose regarding payment for variations that had been orally instructed by the Owners and implemented by the Contractor. Following the Contractor issuing an invoice for the outstanding variation costs, the Owners repudiated the contract and the Contractor accepted that repudiation, thus terminating the contract.

The Contractor brought a claim against the Owners in the Victorian Civil and Administrative Tribunal (Tribunal), for damages for breach of contract (in the amount of $446,000) or restitution for the work, labour and materials involved (in the amount of $945,000).

The Tribunal found the Contractor was entitled, at the Contractor's election, to restitution on a quantum meruit basis for an amount reflecting the reasonable value of the work performed and the materials used. The Tribunal awarded the Contractor $660,000, which it said was the fair and reasonable value of the work and was substantially more than the Contractor would have been entitled to under the contract.

The Owners appealed to the High Court, after having earlier appeals to the Supreme Court of Victoria and Victorian Court of Appeal substantively dismissed.

The Appeal Grounds

Relevantly, the Owners raised three grounds:

1. That the lower courts had erred in holding that the Contractor was allowed to elect to recover a reasonable value of the works carried out by it on a quantum meruit basis following the termination of the contract based on the Owners' repudiation.
2. Alternatively, if the Contractor was entitled to such a restitutionary remedy, the contract should have operated as a ceiling or cap on the calculation of the quantum meruit.
3. That the lower courts had erred in finding that relevant legislative provisions did not apply, so as to preclude the Contractor from claiming a quantum meruit in relation to variations under a domestic building contract (there was

FOOTNOTES

no dispute that the domestic building legislation in issue applied, only whether the legislation permitted restitutionary recovery by the Contractor for variations).

The High Court's Decision

The decision comprises three judgements – Kiefel CJ, Bell and Keane JJ; Nettle, Gordon and Edelman JJ; and Gageler J.

In summary, all seven justices agreed that:

1. termination for repudiation does not render a contract void ab initio;[4]
2. upon termination, the parties are excused from further performance of the contract, but accrued rights remain enforceable and the party in default is liable for damages for breach;[5]
3. where a right to payment under a construction contract has accrued, an innocent contractor can recover payment:
   a. as a debt or damages for breach of contract;
   b. but not on a quantum meruit; and
4. where a right to payment has *not yet accrued*, an innocent contractor can recover (at least) damages for breach of contract.

Gageler J identified that the Court essentially had to determine the Contractor's remedial entitlement, following the termination of the contract by acceptance of the Owners' repudiation, in relation to three categories of work performed:

- work in respect of variations to the contractual scope that the Owners had requested;
- work under the contract for which the Contractor had accrued a contractual right to payment prior to termination; and
- work under the contract for which the Contractor had not yet accrued a contractual right to payment at the time of termination.

Gageler J's categorisation provides a convenient structure to consider the practical implications of the High Court's decision.

Accrued Contractual Rights to Payment

The High Court unanimously held that the Contractor's remedy for stages of work completed prior to termination of the contract (i.e. where a right to payment had already accrued) was for the payment of the contractually agreed amounts due for completion of the relevant stages. Accordingly, the Contractor could not elect to pursue a quantum meruit for completed portions of work.

How this reasoning will be applied in more complex contractual contexts is unclear, particularly where progress payments are assessed and paid on a provisional basis (i.e. when it is unclear whether a right to payment of a set amount has properly accrued).

Divisible Obligations and Uncompleted Work

The majority of the Court[6] held that the Contractor was entitled to choose between damages or restitution for work that had not been completed prior to termination (i.e. where a right to payment of a specified amount had not accrued under the contract). However, any such amount calculated on a quantum meruit basis in relation to uncompleted stages of work should generally not exceed the contract price or the relevant portion of it.

In this respect, the majority held at [200]:

> *"Admittedly, there is cause for concern about the potential for disparity between the amounts recoverable by way of restitution for work done under a contract which is terminated for breach and the amounts recoverable by way of damages for breach of contract. That phenomenon – alarmingly widespread in domestic building disputes of the kind in issue, as it appears – implies a need for development of the law in a manner which better accords to the distribution of risks for which provision has been made by contract."*

The reasoning of the Court in Mann v Paterson represents a significant step forward in providing greater certainty and coherence in the costs that may flow from the termination of a contract.

And, said at [205]:

> *"…where a contract is enforceable, but terminated for repudiation, there are no reasons of practicality and few in principle to eschew the contract price. … There is, therefore, nothing about the termination of the contract as such that is inconsistent with the assessment of restitution by reference to the contract price for acts done prior to termination. The contract price reflects the parties' agreed allocation of risk. Termination of the contract provides no reason to disrespect that allocation."*

Therefore, where a contract does not specify stages of the work and corresponding amounts to be paid upon completion of those stages, a builder may be entitled to claim on a quantum meruit basis for the entirety of the works performed, albeit that the eventual assessment could be constrained by the total contract price. The application of the High Court's reasoning in Mann v Paterson to such circumstances is likely to provide fertile ground for further consideration by Australian courts in the future.

The minority[7] on this relatively narrow point would have allowed the first ground of appeal and limited the Contractor's remedial rights in the present case to damages in contract. This made it unnecessary for the minority to specifically address the issue of whether the contract price acted as a cap on any recovery in restitution.

Ultimately, the majority chose not to directly address the controversy surrounding a party's election between damages or restitution by closing off the ability to choose entirely. Rather, the Court's decision limits both the availability and scope of any quantum meruit following termination as a result of repudiation by:

- confining the availability of a quantum meruit to work performed but for which no contractual right to payment had yet accrued prior to termination; and
- making the calculation of any quantum meruit in that regard effectively subject to a cap by reference to the price(s) attached to the work or parts thereof within the terminated contract.

The Court reasoned that this approach represents a more coherent application of remedies following termination of a contract and places due weight on the contract price(s) negotiated between the parties and the contractual allocation of risk that such consideration represents.

Variations – Domestic Building

The Court unanimously held that relevant provisions in Victorian domestic building legislation provided an exhaustive right of recovery for variations subject to the legislation and precluded the Contractor from obtaining restitution for variations on a quantum meruit basis.

The High Court's construction of the Victorian legislation significantly narrows the scope for recovery of variations to contractual works covered by that (and, likely, similar) legislation, where applicable.

However, any application of the majority's broader reasoning to variation work not covered by such legislation will likely need to be considered further in future cases, particularly where similar issues may arise as with progress payments, including whether contractual mechanisms for valuing variations are sufficiently certain and whether entitlement to such payments represents a sufficiently accrued right to preclude a quantum meruit recovery.

Current Quantum Meruit Position in Australia

Following the *Mann v Paterson* decision, the position in Australia on the use of quantum meruit as a restitionary remedy is limited:

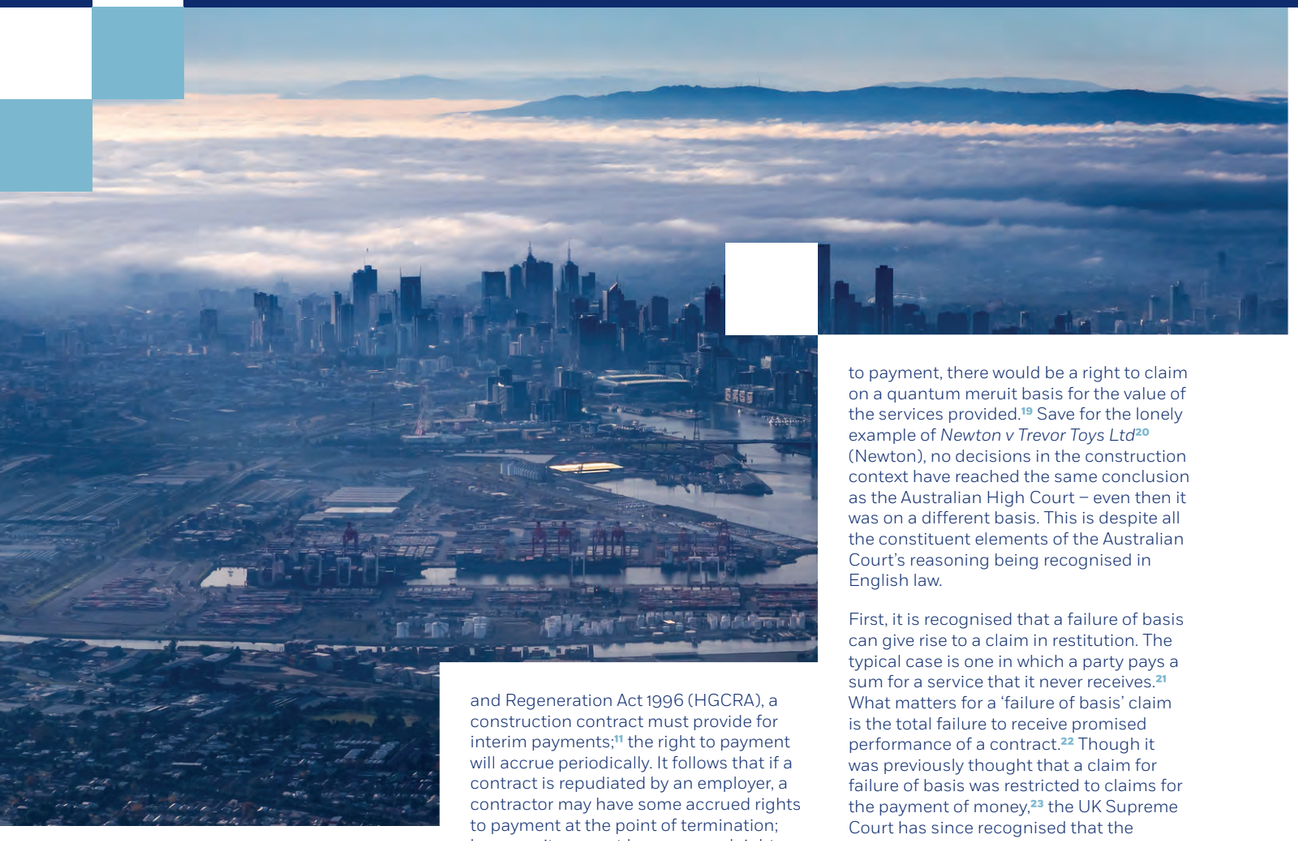
- quantum meruit will not be available if the contractor has an accrued right to payment prior to termination of the contract;
- there appears to be a limited right to quantum meruit if there is no accrued contractual right for payment prior to contract termination; and
- *prima facie* the contract sum will act as a cap to damages.

While the election to pursue a claim in restitution may still be available in limited circumstances, a claim for quantum meruit will likely now be less appealing in the average case, as it is now significantly less likely to permit a party to recover an amount that is materially different from the amount(s) payable under the contract.

The reasoning of the Court in *Mann v Paterson* represents a significant step forward in providing greater certainty and coherence in the costs that may flow from the termination of a contract. However, there is still some way to go before parties can be certain how the case will be applied in relation to more complex construction contracts and projects.

In particular, the question remains how the *prima facie* position of the contract sum acting as a cap will be applied. In respect of a construction contract sum/price, there are many methods which provide for the contractual sum to be adjusted or varied. For example, by variations, increased costs as a result of latent conditions, provisional sums and a change in law. This uncertainty may provide contractors with arguments concerning the amount of the contract sum and how the 'ceiling or cap' should be determined.

FOOTNOTES



The UK position on Repudiation of Contract, Restitution and Quantum Meruit, and How it Now Differs From Australia

On a review of the leading authorities in the UK[8] and Australia, the majority, in *Mann v Paterson*, noted that:

> *"In view of those developments, it may be that the law of restitution in the United Kingdom and the law of restitution in Australia are no longer quite as far apart as was previously imagined."*[9]

But how does the decision of the High Court fit into a perceived trend of convergence on this issue?

The majority decision on this point in *Mann v Paterson* relied upon threads of legal principle, all of which are recognised in English law, but which were drawn together to reach a conclusion which, on similar facts, has not previously been reached in the UK. Accordingly, the decision provides an interesting point of reflection on both (i) the availability of restitutionary remedies in the context of contractual repudiation, and (ii) restitution on a quantum meruit basis.

A principle central to the decision in *Mann v Paterson* is that a contractor under a construction contract normally has no accrued right to payment, unless that is provided for by the contract.[10] Under the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), a construction contract must provide for interim payments;[11] the right to payment will accrue periodically. It follows that if a contract is repudiated by an employer, a contractor may have some accrued rights to payment at the point of termination; however, it may not have accrued rights to payment under the contract in respect of all the work that it has carried out. How do the UK courts deal with this distinction, which formed the basis of Gageler J's different categories of entitlement?[12]

In respect of Gageler J's first category, the English High Court in *Taylor v Motability Finance Ltd*[13] established that where a party has an accrued right to payment under a contract, which is then repudiated by the paying party, the innocent party cannot elect to claim on a quantum meruit basis.[14] In his Judgment, Cooke J recognised that if the contract, which has been repudiated, set out a basis for remuneration in respect of those accrued rights, there was no space for a restitutionary remedy.[15] Once repudiated, the primary obligations under the contract are replaced by a secondary obligation to pay damages.[16] Despite earlier authorities indicating that there was such a right to election on repudiation,[17] in view of recent High Court decisions confirming no such right in respect of accrued rights to payment, the position in English law, now, seems settled.[18]

Gageler J's second category focused on the availability of restitution for the value of work done where there is no accrued right to payment. The majority decision in *Mann v Paterson* relied upon the principle of failure of basis: where the contractor proceeds in a stage of work under a contract, for which it is prevented from completing and accruing an entitlement to payment, there would be a right to claim on a quantum meruit basis for the value of the services provided.[19] Save for the lonely example of *Newton v Trevor Toys Ltd*[20] (Newton), no decisions in the construction context have reached the same conclusion as the Australian High Court – even then it was on a different basis. This is despite all the constituent elements of the Australian Court's reasoning being recognised in English law.

First, it is recognised that a failure of basis can give rise to a claim in restitution. The typical case is one in which a party pays a sum for a service that it never receives.[21] What matters for a 'failure of basis' claim is the total failure to receive promised performance of a contract.[22] Though it was previously thought that a claim for failure of basis was restricted to claims for the payment of money,[23] the UK Supreme Court has since recognised that the principle can extend to the provision of services, too.[24]

Second, the decision in *Mann v Paterson* relied on an ability to apportion and divide the benefits under a contract: where, say, an employer has performed in respect of stage 1 of the works under a contract, it has not in respect of stage 2. A principle apportioning the benefits of a contract, thus severing the 'basis' for the purposes of a restitutionary claim, has been recognised in the English courts. In *Stocznia Gdanska SA v Latvian Shipping Co*[25] (Stocznia) the House of Lords decided that where a shipbuilder designs and builds a ship under a stage payment contract, the benefit of that contract is divided accordingly.[26] For the purposes of determining failure of basis, Lord Goff stated the test as:

> *"The test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due"*[27]

Though the decision in *Stocznia* was decided by reference to the terms of the relevant contract, Lord Toulson has since noted that *"Modern authorities show that the courts are prepared, where it reflects commercial reality, to treat consideration as severable."*[28] In view of the frequent use of staged performance and milestones for payment, it is clear that this reasoning would be likely to apply in construction contracts: often the commercial reality of construction contracts is that benefits conferred at different stages or workstreams can be severed.

In summary, the UK courts recognise (i) the right to claim a restitutionary remedy for services rendered for which there has been a corresponding failure of basis, and (ii) the apportionment of basis under a contract.

So long as (1) the contract in question has been repudiated by an employer; and (2) subject to the terms of a contract meaning that a restitutionary award would not undermine the purpose of the contract,[29] is there a principled reason not to follow the example of the Australian High Court in *Mann v Paterson* in respect of rights that have not accrued under a contract?[30]

Contract Price as Cap

One objection, which was also addressed in *Mann v Paterson*, is the disruptive effect of the availability of a restitutionary remedy which, if calculated on a quantum meruit basis, might exceed the sum otherwise due to a contractor under the contract.[31] However, this concern can be allayed by the principle that any benefit awarded in restitution would be made in reference to the contract price.

In *Newton* the Court of Appeal accepted the view that when a contractor accepts an employer's repudiation, in addition to claiming accrued rights, the contractor may be entitled to payments at contractual rates for work done but not covered by the contractual instalments.[32] In that case, the Court of Appeal found that restitution should be made with reference to the contract prices, rather than on a different basis of valuing the worth of the services rendered. This suggests that although the source of the remedy in restitution is independent of the contract, the basis upon which the quantum is calculable is not.[33]

However, the majority decision in the Supreme Court in *Benedetti v Sawiris*[34] (Benedetti) stated the basis of the calculation for a restitutionary claim in unjust enrichment is the objective market value of those services, subject only to the concept of 'subjective devaluation': a reduction in the objective market value to reflect the subjective value of the services to the defendant.[35] Although the contract price is likely to form a basis for the calculation of a restitutionary claim by providing a guide to the objective market value of the work done, the source of the quantum of entitlement is not contractual.

But the Supreme Court in *Benedetti* also underlined that there were limits to such an approach. Importantly, the concept of subjective revaluation was considered and rejected. If that principle were applied, the quantum of a claim in restitution might be referable not to the objective market value, but to a higher figure, as the subjective value contended for by a claimant. In rejecting this, Lord Reed noted that such a conclusion was inimical to the premise of a restitutionary award:

> *"although I accept that a contract price in excess of the ordinary market value might be evidence of the objective value in particular circumstances, I have difficulty, like Lord Clarke and Lord Neuberger, in seeing how the recipient could be required, in the absence of a contract, to pay more than the objective value of the benefit on the basis of unjust enrichment"*[36]

Though there is no express authority that a restitutionary claim is capped by the contract price, it seems likely that the contract price will play a role in determining the value of the work done. Although it is logically possible that a claim on restitutionary grounds could exceed the contract sum, the more likely result, in a competitive construction market, and in view of reigning judicial instinct, is that the restitutionary claim will not exceed the contract price: as Lord Neuberger stated in *Benedetti*:

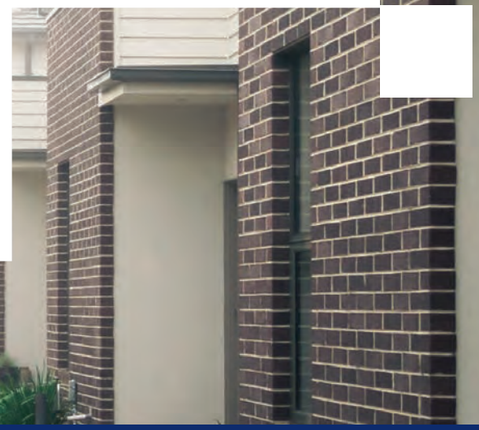
> *"It would seem wrong, at least in many such cases, for the claimant to be better off as a result of the law coming to his rescue, as it were, by permitting him to invoke unjust enrichment."*[37]

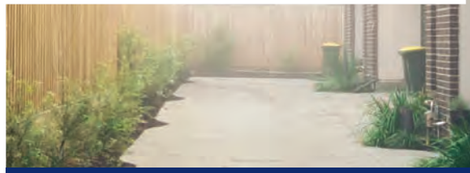
Conclusion

Although the position in the UK is clear in respect of accrued rights under a contract, it is less clear in respect of a contractor's ability to claim in restitution in respect of the value of work done where there is no accrued right under a repudiated contract.

In view of the reasoning of the Australian High Court, which is largely embraced by the UK courts, there seems little principled reason why the courts in this jurisdiction might not also adopt the Australian court's conclusions.

Adopting that approach, in view of the Supreme Court's approach to the quantum of the restitutionary remedy in *Benedetti*, would achieve the same narrowly drawn results as the decision in *Mann v Paterson* – using the contract price as part of the calculation of the restitutionary remedy due. Moreover, it would bring coherence to an unsettled body of UK jurisprudence, while also affirming the trend toward the convergence on the subject of restitutionary remedies, noted in the decision of Nettle, Gordon and Edelman JJ.





By Abdul Jinadu

THE GUTTING OF SECTION 106 OF THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996 PART 1.

Despite the clarity of parliament's intention, unfortunately a series of decisions in the TCC have effectively rendered Section 106 redundant as it relates to adjudication. The assault on Section 106 has come in two forms. The first is the series of cases in which a residential occupier has been found to have submitted to the jurisdiction of an adjudicator and is therefore not entitled to rely on the provisions of Section 106. The second is the line of cases concerning the limits which have been placed on the definition of dwelling under Section 106, when the works are commissioned by an individual but the works included, or wholly related to, work to premises, which were separated physically from the area which is, or is to be, occupied by the employer as his or her residence. In this article which is part 1 of 2, the first of these two lines of cases will be considered.

Background to the HGCRA

1. When it passed the Housing Grants, Construction and Regeneration Act in 1996 ("the Act") parliament included Section 106 which provides as follows:

   "Provisions not applicable to contract with residential occupier.

   (1) This Part does not apply—

   (a) to a construction contract with a residential occupier (see below).

   (2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

   In this subsection "dwelling" means a dwelling-house or a flat; and for this purpose—

   "dwelling-house" does not include a building containing a flat; and

   "flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally."

2. The policy basis and legislative purpose of the section was clearly elucidated on behalf of the government in the House of Lords where in the parliamentary consideration of the Housing Grants Construction and Regeneration Bill ("the Bill") Earl Ferrers speaking for the government said as follows[1]:

   "I am glad to say that none of the amendments in this group is at odds with the principle of having an exclusion for contracts with residential occupiers. We believe that such an exclusion is needed for two reasons. First, there is already in place considerable legislation to protect the right of the consumer. In this case, the client will be a consumer as it is a household contract. Secondly, there is a small but significant risk that unscrupulous contractors may try to browbeat those unfamiliar with the new law into paying for shoddy work. The noble Baroness, Lady Hamwee, asked whether "residence" means main residence. When the Bill refers to "residence", it means any residence. So it would include a second home or a holiday cottage."

3. Subsequently in the parliamentary consideration of the Bill Lord Lucas speaking on behalf of the government said as follows[2]:

   "My Lords, we heard in Committee that the noble Baroness, Lady Hamwee, was concerned that the reference to a residence in Clause 104(1) might be construed as a reference to a main residence. My noble friend Lord Ferrers reassured her on that occasion that when the Bill referred to a residence it meant any residence. I do not believe that there is any more that I can say or that can be added to the Bill to make that clearer."

4. On further debate of the Bill in the House of Lords Earl Ferrers, again speaking for the government, said as follows[3]:

   "Turning now to Amendment No. 76, there are two main changes here, and I will look at the issue most familiar to noble Lords first. Clause 105 excludes from Part II contracts with a residential occupier, and the House will recall that, in Committee, both the noble Lords, Lord Williams of Elvel and Lord Howie of Troon, proposed amendments in the search for the most effective way of achieving this. During the Bill's passage in another place there were still concerns that a client who was building an office block or a factory might include a dwelling so that the whole contract could be exempted from fair contract provisions. Although the Government felt that this was rather unlikely, since the exemption could only apply to an individual owner and not to a company, we were persuaded to bring forward an amendment to make sure that no such loophole existed.

   Having looked at this carefully, we decided that the most equitable and generally satisfactory way of proceeding was to restrict the exemption to contracts whose primary purpose related to a dwelling for one of the parties. This would still allow the exemption to cover contracts on second homes, which I know was a concern of the noble Baroness, Lady Hamwee, at Report, and also to cover contracts where some of the work applied to a separate flat, a garage or an outhouse. It would not, however, allow rich individuals to avoid the Bill by adding penthouse flats to their office blocks."

5. Parliament's intention in passing Section 106 of the Act could not have been expressed more clearly:

   (i) It sought to exclude from the provisions of the Act contracts in which one of the parties was acting as a consumer rather than in the course of business and in so doing it intended to avoid the need to spell out the legislative protections available to consumers in other legislation by simply excluding contracts with consumers from the provisions of the Act.

   (ii) The intention was clearly expressed to protect the consumer from "unscrupulous contractors [who] may try to browbeat those unfamiliar with the new law into paying for shoddy work".

   (iii) The term "residence" was deliberately used so as to include residences other than the employer's primary residence. Parliament's intention was to "restrict the exemption to contracts whose primary purpose related to a dwelling for one of the parties" however the section was broad enough *"to cover contracts where some of the work applied to a separate flat, a garage or an outhouse"*.

   In summary, the overall intention of Section 106 was to concentrate the provisions of the Act on commercial disputes and to leave out of account disputes which relate to ordinary members of the public.

The Courts' Interpretation

6. As regards the line of cases concerning the submission by the employer to the jurisdiction of the adjudicator despite qualifying as a residential occupier pursuant to Section 106, the decision of the TCC in *ICCT Ltd v Sylvein Pinto*[4] ("ICCT v Pinto") illustrates the undermining of the protections provided by Section 106. In that case, Mr Pinto had engaged the contractor to undertake work in relation to his basement and to stop leaks. The work was not paid for. In April 2018, the contractor sent a notice of intent to refer to adjudication. Neither party had engaged with adjudication before. The contractor applied to the Chartered Institute of Building (CIB) for an adjudicator. In May 2018, the CIB president nominated an adjudicator. Mr Pinto was given a deadline by which to reply, however he requested an extension which was granted and he provided the adjudicator with pictures of the leaking basement and subsequently served further documents. The adjudicator found in favour of the contractor and made an award of £6,456 including VAT.

7. Mr Pinto resisted enforcement, inter alia, by seeking to invoke the provisions of Section 106, however the application to enforce was granted. In his judgment Mr Justice Waksman said, inter alia, as follows:

   36 These are perhaps subtle points but I am quite satisfied Mr Pinto's argument is wrong here. There is no blanket ban against adjudications for work done to residential premises and they are quite often agreed in the context of residential construction contracts. It is simply the fact that the mandatory scheme will not cover such disputes. So it does all turn on whether there has been full engagement in the process without any suitable reservation of rights.

FOOTNOTES

FOOTNOTES

37 *All of that is set out in some detail in the Promet case to which I have been referred, which is a decision of Mr Nissen QC who undertakes a comprehensive review of the authorities. That is dated 17 July 2015. There is no difficulty about reservation here because there was not any reservation at all.*

38 *It is right to say that in relation to the party who is said to have waived the jurisdictional point, one has to look at what the party did or did not do objectively. In this particular context, what that means is that the jurisdictional point is capable of being waived and will be waived where it is one that was in the actual or constructive knowledge of the parties seeking to invoke the jurisdictional point, i.e. Mr Pinto. Mr Pinto says, subjectively, he was not, in fact, aware of the residential dwellings exception, as it were, prior to entering into the adjudication. I rather suspect that the claimant was in the same position since it appears to be the first time it has used this process and did so on the basis of the suggestion from somebody else, but I am afraid the fact that Mr Pinto was not aware of it himself does not help him. The general principle is that ignorance of the law is no excuse. He came to this point very recently, in fact I think yesterday, when he submitted points on jurisdiction for the first time but Mr Pinto, who is a professional albeit going into this adjudication process for the first time, is, I am afraid, deemed to know what the law is and this is not some arcane jurisdictional point. Therefore, subject to anything else which he might raise, Mr Pinto has fully engaged with this process and, on that basis, an ad hoc adjudication came into being and any jurisdictional point was waived."*

8. The basis for the court's rejection of Mr Pinto's submissions regarding the application of the Section 106 exemption was that he had not reserved his position regarding the adjudicator's jurisdiction[5] and he had participated in the reference, therefore he was deemed to have submitted to an ad hoc reference to adjudication[6] despite the entitlement to rely on the Section 106 exemption.

9. The court dismissed Mr Pinto's argument that he was unfamiliar with the details of adjudication as a process and he was specifically ignorant of Section 106. An observation made by judge at paragraph 2 of the judgment suggests, at least in part, the basis for the court's dismissal of Mr Pinto's argument:

"2. He has at in this hearing presented his arguments succinctly and politely, and with not a little sophistication. That is perhaps unsurprising because he is a professional person, being a certified accountant. As some of his emails make plain, he has obviously had some experience of the legal process including, for example, tribunals……

It appears that the court was of the view that Mr Pinto was a relatively sophisticated party with experience of the legal process. This consideration appears to have influenced the court's decision.

Opinion on the Decision

10. However, in the author's view, the decision in *ICCT v Pinto* flatly contradicts parliamentary legislative intent and deprives Section 106 of much, if not all, of its efficacy. Parliament's express intent was to exclude residential occupiers from the provisions of the Act on the grounds that they should be afforded the protections provided to consumers. Such individuals cannot reasonably be expected to be aware of the provisions of the Act as it relates to adjudication or at all and such individuals cannot reasonably be expected to be aware of the existence of the provisions of Section 106. It cannot have been parliament's intention that the right of an exemption to the provisions of the Act on the basis that the individual was a consumer would be lost if such individual did not assert that right immediately on being joined as a party to an adjudication. It is unlikely that given the truncated timescales, which are a preeminent feature of statutory adjudication, the individual residential occupier would even have the opportunity to obtain competent legal advice as to his or her rights. It is the author's view that, while it may be appropriate in the context of statutory adjudication between commercial entities to require a party joined to adjudication to raise any jurisdictional objection at the outset or to set the bar for conduct which would be characterised as amounting to participation in the adjudication at a low level, it is not appropriate to adopt the same position in respect of an individual who is entitled to rely upon the residential occupier exemption.

11. With the greatest respect to the learned judge, it is unrealistic to expect individuals entering into building contracts on their own residential dwellings to be aware of the provisions of Section 106 or indeed of the Act. It is therefore difficult to understand the basis for applying the requirement for the reservation of position, which the courts have developed in respect of non-residential occupier cases, to cases where a party would be entitled to rely on Section 106.

12. The reference to the *"general principle … that ignorance of the law is no excuse"*, with respect to the learned Judge, misses the point. Parliament intended to exempt residential occupiers from the provisions of the Act. An individual cannot be expected to assert or rely on rights of which he had no knowledge. Consumers are not expected to be fully cognisant of all the rights conferred by legislation. In order to waive the right, surely the residential occupier must be shown to have been aware of such rights.

13. In passing the Act and specifically the provisions in relation to adjudication, parliament was deliberately redistributing the commercial balance between the parties in order to achieve specific policy goals viz. those identified in the Latham Report. In adopting this course of action, parliament chose to specifically exempt residential occupiers and to limit the application of the provisions of the Act to contracts between two commercial entities. As it relates to adjudication, the rationale was that the speed and somewhat "rough and ready" nature of decisions obtained through the adjudication process was a desirable price to pay to ensure cashflow in the construction industry and that the "pay now argue later" philosophy would provide sufficient safeguards. In adopting this policy approach parliament exempted residential occupiers because it was of the view that the compromised timescales and summary processes involved in adjudication were not appropriate for contracts with consumers.

14. By imposing the requirement that in order to benefit from the provisions of Section 106 the residential occupier has to raise this as a jurisdictional objection at the outset of the process, the courts have failed to give effect to parliament's attempt to address the *"significant risk that unscrupulous contractors may try to browbeat those unfamiliar with the new law into paying for shoddy work."*

15. The decision in *ICCT v Pinto* was recently applied in *St Peter Total Building Solutions Ltd v Michelle Rhodes*[7], where the defendant property owner applied under CPR r.13.3 to set aside a default judgment entered in favour of the claimant building company. The claimant had been contracted to carry out building works on the defendant's property. It was the defendant's case that the intention was to convert the property into a number of flats which were to be occupied by herself and members of her family. A dispute arose between the parties, which the claimant referred to adjudication. On 24 September 2019, the adjudicator was appointed and the referral notice was issued shortly thereafter. On 11 October, the defendant, who had suffered from a number of health conditions since October 2018, was admitted to the accident and emergency department and subsequently underwent surgery. She informed the adjudicator that she was unable to deal with the adjudication due to her medical condition. On 18 October 2019, she asked the adjudicator to read a structural engineer's report which she had sent him and requested an extension of time in which to deal with the adjudication. The adjudicator informed her that he had to make his decision by 25 October. On 21 October, the defendant, having taken legal advice, proposed a 14-day extension for the submission of documents. When that proposal was rejected by the adjudicator, she sent a series of documents to him which she invited him to take into account. The following day, the adjudicator decided the dispute in the claimant's favour. The claimant subsequently commenced enforcement proceedings and, on 20 January 2020, obtained judgment in default when the defendant failed to serve an acknowledgement of service. In February the defendant instructed solicitors.

16. The learned judge addressed the applicant's application in part by holding that her attempt to resist enforcement of the adjudication decision had no hope of success, as she was not entitled to rely on Section 106, because she was deemed to have submitted to the adjudicator's jurisdiction. The facts in this case illustrate the difficulty which any residential occupier will have in relying on Section 106 unless he or she states at the outset that (a) he or she is not participating in the adjudication on the basis of Section 106; or (b) he or she asserts the right to rely on Section 106 and reserves his or her position, but participates in the adjudication strictly under protest, and subject to this reservation, making it clear that he or she does not accept the adjudicator's jurisdiction to determine his or her jurisdiction.

Conclusion

17. In conclusion, the courts have in effect removed the protection for residential occupiers, which parliament intended to provide by Section 106, by imposing a requirement for reliance on that right which parliament did not intend and which is not founded on principle. Unfortunately, it seems unlikely that the courts errant application of the provisions of Section 106 will be addressed by anything other than statutory action.

18. In the second part of this series the decisions which have had the impact of restricting the definition of a dwelling will be considered.

"It cannot have been parliament's intention that the right of an exemption to the provisions of the Act on the basis that the individual was a consumer would be lost if such individual did not assert that right immediately"

CASE REPORT: ESSEX V UBB WASTE

Marcus Taverner QC, Piers Stansfield QC and Paul Buckingham acted for the successful Claimant.

On 18 June 2020, Pepperall J handed down judgment in Essex County Council v UBB Waste (Essex) Ltd[1] following a six week trial in the TCC. He awarded Essex County Council (Essex CC) damages in excess of £9 million as a result of the defective construction of a waste treatment facility under a PFI contract and held that Essex CC was entitled to terminate the contract.

Although many of the issues turn on the specific facts of the case, the judge was highly critical of the Defendant (UBB) and its main expert witness for their failure to recognise and raise obvious and serious conflicts of interest. Whilst accepting that there was a term of good faith to be implied into the 25 year PFI contract, he rejected the notion of a general principle which required contractual termination rights to be exercised within a reasonable time and held that no such term was to be implied into this contract.

Background

Essex CC entered into a 25-year contract with UBB on 21 May 2012 for the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant in Basildon to process the county's waste. After completion of the facility, the contract provided for a commissioning period followed by Acceptance Tests that were intended to confirm that the facility could meet the performance requirements in the contract. These tests should have been completed by the Planned Services Commencement Date of 12 July 2015 but, if not ultimately passed by an Acceptance Longstop Date of 12 January 2017, Essex CC was entitled to terminate the contract.

Essex CC's position was that UBB had failed to design and construct the facility properly so that it was incapable of passing the Acceptance Tests. It said that UBB's failure either to pass the Acceptance Tests or to attempt to do so by the Acceptance Longstop Date was an event of Contractor Default which, pursuant to Clause 67 of the contract, entitled it to terminate. Essex CC sought a declaration to this effect, as well as substantial damages.

UBB's primary position was that, on a proper construction of the contract, the facility was capable of passing the Acceptance Tests and it sought a declaration of deemed acceptance. Further, it contended that any delays in passing the Acceptance Tests were due to failures on the part of Essex CC to supply contractually compliant feedstock to the facility. UBB also argued that these failures breached an implied term of good faith.

Judgment

Pepperall J found that the facility's failure to pass the Acceptance Tests was due to serious design errors by UBB and not because of any actions or omissions by Essex CC. The major error lay in UBB's overestimate of the density of the waste such that the facility was significantly undersized for the amount of waste that it should have been able to process.

The judge held that UBB's attempts to remedy the defects in the plant were carried out and implemented in a manner which breached the contract. Essex CC was accordingly entitled to damages in excess of £9m due to the additional costs that it had incurred as a result of UBB's unilateral decision to process the waste in a manner that contravened the contract.

A number of particular legal issues arose during the course of the judgment.

Conflicts of interest and the role of expert witnesses

Pepperall J was heavily critical of UBB's use of a technical expert witness, Dr John Weatherby. Essex CC challenged Dr Weatherby's independence, impartiality and objectivity. The judge's attention was drawn to the fact that Fichtner, the company for which Dr Weatherby was managing director, had advised UBB in relation to the earlier design and construction phases of the project. There was also email evidence which showed a link between Dr Weatherby's willingness to act as an expert witness and UBB's position taken in its defence of the claim.

The judge reached three main conclusions in relation to that expert evidence. First, that Dr Weatherby should have recognised that the substantial role played by his company amounted to a conflict of interest. Secondly, that he had failed to distinguish between the different roles of the provision of consultancy services to a client and that of acting as an expert witness. Thirdly, he should have recognised that, even though there was no direct claim in relation to his company's consultancy work, a conflict of interest still arose.

If the full extent of the conflict had been identified at the case management conference, he said that it was doubtful that permission to rely on the expert evidence would have been granted. However, the judge declined to exclude Dr Weatherby's evidence due to the late stage of the proceedings at which the issues arose, but said that he would treat that evidence with caution. Ultimately, he preferred the evidence of the employer's experts.

Contractual interpretation of a "rolling annual average" provision

There was a dispute as to the proper interpretation of a 'rolling annual average' provision in the contract and whether a single composition test result was sufficient to trigger a defined contractual mechanism called an "Options Review".

The judge concluded that an earlier adjudicator had been wrong and that the results of each composition test result should be determined on a rolling annual average basis rather than a single result because UBB had accepted the risk that waste composition might fluctuate not just from day to day but from quarter to quarter. That erroneous adjudication decision had led to the parties having been compelled to engage in an Options Review process which was now a 'parallel universe' into which he no longer needed to travel.

Implied term of Good Faith

The judge considered the question of whether there should be a term of good faith implied into the contract. He identified a number of factors which pointed to the agreement being a relational contract, including the long-term nature of the contract, the high level of communication and co-operation it required between the parties, and other features which pointed to the parties' intention that their roles be performed with integrity and with trust and confidence in each other.

He decided that a term requiring each party to act in good faith could be implied as it was a relational contract. He then considered the scope and content of the implied term of good faith, concluding that:

i) Whether a party has not acted in good faith is an objective test;

ii) The key question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people; and

iii) What will be required in individual cases depends upon the contractual and factual context.

Applying those principles, the judge dismissed all UBB's allegations of breach of the term of good faith. He commented that it was somewhat ironic that UBB had relied so heavily on that term when it was arguable that UBB itself had not acted in good faith in relation to its original concealment of the density problem, its attempt to replace the BMc test with a different test, and its piecemeal presentation of the QSRF line modifications to Essex CC.

Implied Term as to the timing of the exercise of a contractual right of termination

Pepperall J's judgment contains a further discussion as to whether a term should be implied into the contract requiring a contractual termination option to be exercised within a reasonable time.

The judge reviewed the authorities and rejected the argument that there was an immutable rule of law that all rights of termination must be exercised within a reasonable time after such right first arises. He said that the proposed term should be tested against the usual principles for finding an implied term and rejected the implication of a term as to promptness on the basis that it was neither necessary to ensure that the contract had commercial or practical coherence nor was it obvious.

He also rejected a narrower formulation of the term on the basis that it was neither necessary nor obvious since delay in the exercise of the right of termination beyond the point when the facility passes the Acceptance Test was best dealt with by the doctrine of waiver by election.

FOOTNOTES

2019 RAIL FRANCHISING LITIGATION – WHEN THE GAMBLE DOESN'T PAY OFF

By Fionnuala McCredie QC and Rachael O'Hagan

Earlier this year Mr Justice Stuart-Smith handed down judgment in what is formally known as: *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport; West Coast Trains Partnership Ltd v Department for Transport; Stagecoach South Eastern Trains Ltd v Secretary of State for Transport*[1]. This was a beast of litigation, which earned its own short-form title: "2019 Rail Franchising Litigation".

The issues which gave rise to the litigation are summarised in paragraph 1 of the judgment:

> *"The Defendant Secretary of State was conducting three franchise procurement competitions during a period when there was considerable uncertainty about the scope of potential pension liabilities because of intervention by the Pensions Regulator ("TPR")."*

In his judgment, Mr Justice Stuart-Smith dismissed the three claims in their entirety. The judgment is detailed and lengthy, running to some 601 paragraphs. In summary, the Judge found that the Secretary of State ("SoS") and the Department for Transport ("DfT") had made a lawful decision to disqualify several train operating companies because the train operating companies had proposed amendments to the franchise agreements which would transfer a greater proportion of the pensions risk to the Government than that which had been envisaged under the franchise agreement. The gamble taken by the train operating companies in marking up the franchise agreements had not paid off.

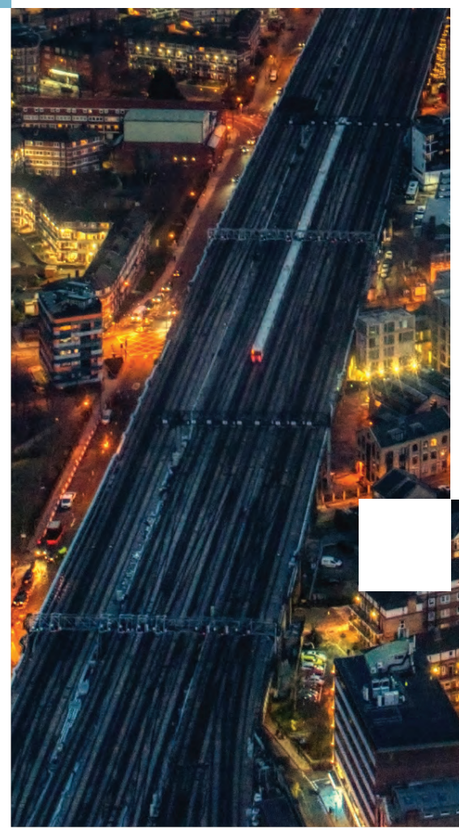
Fionnuala McCredie QC, Rachael O'Hagan and Harriet Di Francesco acted for SoS in this litigation. In this article, Fionnuala and Rachael shall consider the following aspects of the 2019 Rail Franchising Litigation:

- The background.
- Some of the key legal principles.
- Key findings.
- Franchising post COVID-19.

THE BACKGROUND

The litigation concerned three separate competitions for the West Coast, East Midlands and South East rail franchise competitions. The competitions were not subject to the provisions of the Public Contracts Regulations 2015. It was common ground between the parties that the competitions were subject to: (1) Articles 49 and 56 of the Treaty on the Functioning of the European Union ("TFEU"); (2) duties imposed by the Railway Regulation (1370/2007); and (3) the general principles of EU law (and, more specifically, the principles of non-discrimination, proportionality, transparency, equal treatment, the protection of legitimate expectations, the requirement to act without manifest error and good administration).

By way of background to the issues which arose, the Railway Pension Scheme is a shared cost defined benefit private scheme, which is under investigation by the TPR in relation to its funding levels. Rail franchisees are responsible for employer contributions. The TPR's investigation into the railways pension scheme at the time of the competitions meant that the future position and the funding of the scheme was uncertain. As a result, DfT offered contract terms for each franchise which would place the risk of pension liabilities on the successful bidder, subject to limited protection by way of a mechanism called the Pensions Risk Sharing Mechanism ("the PRSM").



Significantly, the Invitations to Tender ("ITTs") provided that:

- Bidders *"shall not propose amendments"* to the franchise agreements.
- SoS had a discretion to reject a non-compliant bid and (amongst other things) to disqualify the bidder from the competition.

The Claimants were train operating companies who submitted bids which rejected SoS's allocation of risk and offered to contract on different terms. SoS did not accept the bidders' alternative proposals and disqualified those non-compliant bidders, notifying the bidders by way of disqualification letter.

The Claimants brought claims challenging SoS's decision to disqualify the non-compliant bidders and making other complaints about the procedure which had been adopted by SoS. The Claimants claimed that there had been breaches of the Railway Regulations and the EU principles of proportionality, equal treatment and transparency. The Court directed that the claims be heard together on an expedited basis (as discussed further below). The pensions issues were heard at a three-week trial in January and February 2020.

SOME OF THE KEY LEGAL PRINCIPLES

In reaching his decision, the Judge reviewed and helpfully summarised the caselaw applicable to the issues. The highlights are set out below.

Policy and allocation of resources

Referring to the decision in *R (Lumsdon and others) v Legal Services Board*[2], *the Judge stated that it "is well established in EU and English jurisprudence that Member States are afforded a wide margin of appreciation in relation to decisions involving the discretionary allocation of public resources" (para 20). Applying the further guidance in R (Rotherham Metropolitan BC) v Secretary of State for Business, Innovation and Skills*[3], the Judge found that this was a "classic case" where the courts should afford a wide-margin of appreciation. At paragraph 23 he said:

> *"Two points illustrate the potential sensitivity of whatever decision might be made. First, increasing the contractual support for the TOCs would give rise to contingent liabilities that could affect other areas of government, all of which were competing for limited resources. Second, any proposal for support in the present franchising competitions would give the successful bidder a level of government protection against pension risks that was not available to existing franchisees who were exposed to the same risks by TPR's intervention."*

Equal treatment

With regards to the principle of equal treatment, the Judge summarised the applicable principles as being:

- Paragraph 26: The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment can be objectively justified.
- Paragraph 26: There is, however, a wide margin of discretion in designing and setting the award criteria. *"What is forbidden is unequal treatment that falls outside the margin of discretion that is open to a contracting authority or that is 'arbitrary or excessive'."*[4]
- Paragraph 27: Once the contracting authority has laid down the terms on which bidders are required to tender, *"it is obliged to require strict compliance, at least with 'fundamental requirements' or 'basic terms' of the tender."*[5]

- Paragraph 28: *"one of the consequences of the principle of equal treatment is that a contracting authority may not subsequently change one of the essential conditions for the award if it may have enabled the tenders to submit a substantially different tender."*[6]

Transparency

With regards to the principle of transparency, the Judge summarised the principles as follows:

- Paragraph 29: *Case C-19/19/00 SIAC Construction Limited County Council of the County of Mayo* [2001] WCR 1-772 provides a convenient and succinct summary of the principle of transparency.[7]
- Paragraph 30: The principle applies to all conditions and detailed rules of the award procedure, which could cover conditions about disqualification of bidders.
- Paragraph 31: Evidence about what tenderers themselves thought a tender document meant will generally be irrelevant – its meaning is to be assessed objectively.[8]
- Paragraph 33: The principles of equal treatment and transparency also require an authority to disclose any matter which it intends to consider when evaluating bids.[9]
- After reviewing further authorities, the Judge concluded:

  "36. In practice this means that there will be very limited circumstances in which it could be appropriate for a bidder to be permitted to amend their bid after the deadline for submissions: and it will seldom, if ever, be permissible for a contracting authority to vary the criteria that it has laid down or to permit non-compliance with them. Transparency and equal treatment require rigour in maintaining and enforcing the framework against which bidders have been asked to tender.

  37. One gloss needs to be added. A contracting authority is generally not obliged to divulge its system of marking or its methodology of evaluation though, if it does so, it would be obliged to stick to that too..."

Financial robustness tests

The ITT set out a financial robustness test, the utility of which was criticised by the Claimants. With regards to such a test, the Judge stated (amongst other things) that:

> *"39. There was and is no requirement of EU or UK Law that there should be a Financial Robustness Test or any test of the ability of franchisees to withstand downside risks or the vagaries that may affect the operation or financial outcome of the franchise.*
>
> *....*
>
> *40. ... if a contracting authority chooses to introduce a Financial Robustness Test as part of its procedure for choosing to whom a contract should be awarded, it must set out the requirements of the test clearly and must then stick to them."*

Exercising discretions

The ITT provided (amongst other things) for SoS to have an unqualified discretion with regards to disqualification. As to the principles to be applied to such a discretion:

- Paragraph 45: The relevant principles when considering an apparently unqualified unilateral discretion are set out in *British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others.*[10]
- Paragraph 54: After reviewing further authorities, the Judge found that neither *R (Law Society) v Legal Services Commission*[11] nor *Succhi di Frutta* supports a submission that the reserved power of disqualification in the ITTs in the present case was inherently unlawful.

Proportionality

After reviewing the decisions in *Lumsdon*[12] and Case *265/87 Schrader*,[13] the Judge made the following distinctions concerning the principle of proportionality:

> *"59....*
>
> *i) Where a Member State acts in a way that imposes restrictions on EU fundamental rights ... although the Member State will enjoy a margin of discretion in its choice of policy choices and implementation, that discretion is subject to relatively rigorous scrutiny: and the principle of proportionality will be applied so that the measure must not go beyond what is necessary and appropriate to safeguard and achieve the relevant policy objective and must not be disproportionate to the benefits secured by it.*
>
> *ii) On the other hand, where a Member State is acting within the scope of EU law and does so without imposing restrictions on an established right conferred by the EU Treaties, it enjoys a very broad discretion and the Court will only intervene on proof of 'manifest error'."*

Manifest error

The Judge reviewed the applicable authorities and added at paragraph 65:

> *"It is not necessary and would be wrong in my judgment to import an additional requirement that the error must be 'fundamental', though it must be of sufficient materiality to justify the Court's intervention."*

Duty to give sufficient reasons

After reviewing the relevant authorities, the Judge stated at paragraph 76:

> *"It remains my view that a procurement in which the contracting authority cannot explain the reasons for its decision fails the most basic standard of transparency. That said, there is no requirement that the reasons and reasoning must all be contained in one document (whether that be the document conveying the decision or otherwise), though the later the purported explanation, the greater the scrutiny that will be required to ensure that what is being provided is in fact the reasons or reasoning that prevailed at the time and not merely an ex post facto justification."*

"It remains my view that a procurement in which the contracting authority cannot explain the reasons for its decision fails the most basic standard of transparency

KEY FINDINGS

The Judge dismissed each of the Claimants' claims, resulting in a resounding victory for SoS. The key findings are summarised in this Section below.

Issue: Discretion to disqualify: **Did the terms of the ITT governing SoS's treatment of non-compliant bids and disqualification breach their duties of transparency and fairness?**

The answer to this question was: No. The Judge held that the terms of the ITT regarding amendments were clear and *"admitted of no misunderstanding"*. They did not create unfairness between the respective bidders and SoS. The terms concerning the allocation of risk are subject to a wide margin of appreciation as they were part of an *"overall package of rights, risks and obligations"* and manifested policy decisions about the allocation of public resources. Applying *Telefónica*, the discretion had to be exercised rationally and in accordance with policy could not be exercised in an *"unlimited or arbitrary or capricious basis."*

Issue: Uncertain risk/margin of appreciation: **Was there a breach of the duties of transparency/fairness due to seeking to impose large/uncertain risks?**

The answer to this question was: No. There was no principle of EU or UK law that limited the size of the risk that may be allocated to a contracting party in a public procurement exercise. The Judge held that a contracting authority is afforded a wide margin of appreciation in relation to the allocation of public resources, including the level of state support or protection that it would make available to a prospective bidder. The writers respectfully suggest that this finding accords with good commercial common sense: the bidder has the option to (i) price the risk (as with any other contractual risk) or (ii) choose not to bid for the contract.

Issue: Treatment of exogenous risks freedom to contract: **Did SoS breach its duties of proportionality or fairness, or the Claimants' rights under the Railway Regulation or the TFEU by seeking to allocate pensions risks to the franchisees which were exogenous or outside their control?**

The answer to this question was: No. There was no principle of EU or UK law which precluded the allocation of exogenous risks to bidders rather than the Government. The Claimants could have chosen to bid at a level which would have given them protection under the PRSM. However, the Claimants chose not to bid in that way.

Issue: Disqualification: **Were the decisions to disqualify unlawful?**

The answer to this question was: No. With regards to the Claimants' complaints about SoS's marking and evaluation criteria, the Judge held that a contracting authority is not required to divulge its system of

FOOTNOTES

"The Judge held that a contracting authority is not required to divulge its system of marking or its methodology or evaluation."

marking or its methodology or evaluation. SoS had some "leeway" in how it assessed the bids provided that it did not change the award criteria.

***Issue: Reasons:* Did SoS provide sufficient reasons?**

The answer to this question was: Yes. SoS's reasons as set out in its disqualification letters were concise, clear and sufficient to enable the Claimants to know that they had been disqualified for non-compliance with the pensions requirements.

***Issue:* Did SoS breach its duties by failing to take proper account of financial robustness of the pensions compliant bids and by relying on additional reports?**

The answer to this question was: No. There was no requirement of EU or UK law that required a contracting authority to include a test of financial robustness in the criteria for accepting bids. Even if such a test were to exist, the requirements of that test had been set out clearly and SoS had complied with the test. SoS was entitled to determine the extent of any robustness testing that he wished to put in place.

Also, DfT had commissioned PwC to analyse the leading bids to determine whether they remained robust if various downside pensions risks materialised. SoS said that the purpose of this exercise was to determine whether to continue with the competitions or to abandon them. The Claimants claimed that this exercise was used to evaluate the financial robustness/ assess the sustainability of leading bids. The Judge found that there was no provision of EU or UK law that required a decision to cancel a competition to be taken solely on the basis of information generated by the terms of the ITT. The PwC analysis was used only to inform the decision whether or not to cancel the competitions.

THE END OF AN ERA: RAIL FRANCHISING POST COVID-19

No sooner than the dust had started to settle on our closing submissions and whilst we eagerly awaited the judgment, the COVID-19 pandemic started to kick-in resulting in low passenger numbers on the train services and the Government agreeing to pay the losses of rail companies (which have cost more than £3.5bn) which had been affected by dwindling passenger numbers. Judgment was handed down on 17 June 2020 but only a few months later, on 21 September 2020, the Government announced the "end of the era" for rail franchising after some 25 years. Instead, a series of Emergency Recovery Management Agreements were put in place whilst the Government works towards a more long-term overhaul: https://commonslibrary.parliament.uk/research-briefings/cbp-8961/

It remains to be seen what the future holds for rail franchising contracts.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

2019 Rail Franchising Litigation [2020] EWHC 1568 (TCC)

The three Claimants (Arriva, Stagecoach and WCTP) issued proceedings challenging the decision of the Secretary of State to disqualify them and made other complaints about the procedure the Secretary of State had adopted. Their complaints concerned (amongst other things) the treatment of pensions. Following an expedited process, the pensions issues were heard at trial over three weeks in January and February 2020.

Mr Justice Stuart-Smith rejected the Claimants' claims in their entirety.

A detailed note on this case can be found at page 16.

Fionnuala McCredie QC and Rachael O'Hagan represented the Defendant.

Essex County Council v UBB Waste (Essex) Limited [2020] EWHC 1581 (TCC)

On 18 June 2020, Pepperall J handed down judgment in this case following a six week trial in the TCC. He awarded Essex County Council (Essex CC) damages in excess of £9 million as a result of the defective construction of a waste treatment facility under a PFI contract and held that Essex CC was entitled to terminate the contract.

A detailed note on this case can be found at page 14.

Marcus Taverner QC, Piers Stansfield QC and Paul Buckingham represented the Claimant.

Community R4C Ltd v Gloucestershire County Council [2020] EWHC 1803 (TCC)

Gloucestershire County Council successfully defeated the Claimant's procurement challenge to the amendment of a substantial contract for the construction and operation of an energy from waste plant. At the trial of preliminary issues in the Bristol TCC, the Judge found that the Claimant was not an economic operator which could have successfully pre-qualified, having regard to any selection criteria that could have been lawfully imposed upon it by the Council.

Sarah Hannaford QC represented the Defendant.

Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd [2020] EWHC 2308 (TCC)

Dr Jones Yeovil Limited, a contractor, succeeded on its claims for unpaid retention under two contracts for the construction of 11 assisted living units and defeated the counterclaim for over £240,000 for alleged defects raised by the defendant employer in full. The 7-day trial in the Bristol TCC was one of the first TCC trials to be heard remotely and was conducted entirely by Zoom (with one of the defendant's witnesses who telephoned another witness during a break in his evidence while still audible on Zoom providing a cautionary tale for parties and their representatives getting used to remote trials).

The judgment includes a detailed discussion and analysis of interesting points of law in respect of claims for retention under a JCT contract where a Certificate of Making Good has not been issued and the application (or not as the Judge found) of the principle of transferred loss, or the Albazero exception, where despite the employer not owning the development the contracts excluded the application of the Contract (Rights of Third Parties) Act 1999 and did not adopt the collateral warranties / purchaser and tenant rights available in the JCT standard form.

James Frampton represented the Claimant.

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Ors [2020] EWHC 2537 (TCC)

MW High Tech Projects UK ("MW") was engaged as the main contractor under an EPC Contract to design, procure, construct, commission and test a fluidised bed gasification power plant, capable of processing refuse derived fuel ("RDF") produced by commercial, industrial and municipal solid waste ("the Main Contract"). The parties entered into a contract based on the IChemE Red Book, with bespoke amendments.

Outotec was engaged by the contractor to supply elements of the plant under the IChemE Yellow Book ("the sub-contract), with bespoke amendments. Outotec provided a collateral warranty in favour of the employer, whereby the employer could step into the sub-contract if the main contract was terminated. Both the sub-contract and main contract was assigned to Outotec if the main contract was terminated.

The project suffered difficulty and the employer terminated the main contract, the basis on which that occurred was disputed. The employer never ended up stepping into the sub-contract. However, MW did assign the sub-contract to the employer.

The employer commenced proceedings against MW for damages of breach of contract relating to delay, losses arising from termination and the need to engage third parties to complete the works and defects in the works. MW added Outotec as Part 20 defendant, alleging that the losses claimed by the employer related to the Outotec's breach of the sub-contract.

This was a preliminary hearing to determine (1) Whether MW retained the benefit of accrued rights against Outotec or, if not, whether assignment transferred both the benefit and burden of the sub-contract; and (2) whether MW can pursue its claims for contribution against Outotec as direct claims, in respect of accrued rights under the sub-contract, or based on its liability for "the same damage" pursuant to the Civil Liability (Contribution) Act 1978 ("the 1978 Act").

It was held, by O'Farrell J, that the assignment of an IChemE sub-contract from the contractor to the employer on termination of the main contract transferred the benefit of all accrued and future rights, leaving the contractor with no contractual claim against the sub-contractor.

Vincent Moran QC and William Webb represented the Defendants. Adrian Williamson QC and Paul Bury represented the Part 20 Defendant.

JRT Developments Ltd v TW Dixon (Developments) [2020] 10 WLUK 106

The TCC ordered a stay of enforcement of a substantial "smash and grab" adjudication decision. The court held that had the judgment not been stayed, there would have been manifest injustice to TWD and JRT would not have been able to repay the judgment sum at the end of the substantive trial. Manifest injustice is difficult to prove and which Brenna was successful in proving.

Brenna Conroy represented the Defendant.

STRANGER THINGS? NEW OBLIGATIONS AND JURISDICTIONS IN INTERNATIONAL INVESTMENT TREATIES AND ARBITRATIONS

By Sean Wilken QC and John McMillan

International Investment Treaties and their associated arbitrations have long been thought to be an enclave for the rigorous pursuit of purely commercial interests – usually at the behest of multinationals. On one level this is unsurprising – International Investment Treaties are, after all, all about investment and, indeed, this has been and to a large extent remains the primary focus of the Treaties and the arbitrations brought under them. The concomitant result of that is that human rights and environmental protections have, historically, had little or no relevance to the arbitral tribunal's deliberations and awards.[1] Indeed, of the over 3000 investment treaty instruments[2] in existence[3] only a handful – and it is a recent handful at that – contain any sort of human rights or environmental protection provisions.[4]

On another level, however, the absence of any consideration of human rights and environmental protections (or even "soft law" concepts such as corporate social responsibility) is surprising. Since Nuremberg, public international law has recognised that unrestrained domestic economic behaviour can violate international law.[5] It is now becoming established that human rights[6] and environmental rights[7] should form part of the *ius cogens*. Further, international investment arbitrations stem from treaties – a fact which has two consequences. First, the rights and obligations at issue are ultimately founded in international law.[8] Second, the provisions of Article 31 of the Vienna Convention on the Law of Treaties apply. Article 31(3)(c) requires *"any relevant rules of international law applicable in the relations between the parties" "shall"* be taken into account. Where the parties to an International Investment Treaty are both signatories to any form of treaty providing for human rights or environmental protections, then those treaty provisions could and should be relevant in any subsequent international arbitration.[9]

Thus, it would be odd if International Investment Arbitration did not begin to recognise or consider the application of non-commercial concepts of public international law.

There have been attempts to agree international principles or guidance for corporate conduct since as early as 1977 with a draft UN Code of Conduct in Transnational Corporation. A further attempt at the same document was made in 1992. In 2003, the funders themselves attempted to formulate a framework for addressing environmental and social risks in projects with the "Equator Principles". The UN returned to the fray with the Special Representative's report on *"Guiding Principles on Business and Human Rights"*[10] in 2011. Most recently, in 2014, the UN Human Rights Council established an *"open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights"*, which was tasked with developing a legally binding instrument to regulate transnational corporations' activities in human rights law.[11] No instrument has yet been approved, but the latest draft was published in August 2020.[12]

Yet, such principles are rarely invoked in International Investment Treaties or Tribunal Awards. As at 2012, Dolzer and Schreuer were able to conclude:

> *"Whether or not the object and purpose of investment – treaties – the increased flow of foreign investment – would be promoted or hindered by an extension of the subject matters of the treaties, and a corresponding new design of their nature, will have to be a necessary part of the future discussion of BITs in their traditional scope."*[13]

This article therefore considers the current state of the law in this area. In doing so, it discusses the extent to which there is either a tension in Tribunal Awards or whether there is a visible trend in where the law in this area is or could be going. It starts with what is a striking decision in many ways – *Chevron v Ecuador.*[14]

Chevron v Ecuador

Until recently, where they referred to them at all, investor-State Awards largely relied on human rights instruments to protect investors' economic activities, rather than to protect those who claim to have been harmed by such activities. That was the position in *Chevron Corp & Texaco Petroleum Corp v The Republic of Ecuador.*[15]

Chevron had taken over Texaco in 2001 in circumstances where a Texaco subsidiary was facing allegations of long-standing pollution in Ecuador. A class action had been brought in the United States and dismissed in 2002 on *forum non conveniens* grounds. In 2003, a different but overlapping set of Plaintiffs had commenced a claim against Texaco in the Superior Court of Nueva Loja in Lago Agrio ("the Lago Agrio Claims"). In 2009, Chevron commenced an International Investment Treaty Arbitration against Ecuador alleging, amongst many other things, that the conduct of the Lago Agrio Claims breached the US – Ecuador BIT.[16]

By 2011, the Plaintiffs had succeeded in the Lago Agrio Claims and obtained a judgment of US$18.2bn.[17] The judgment was appealed and at each stage the judgment was upheld by the Ecuadorean Courts. Meanwhile, the Investment Treaty Arbitration continued.

For present purposes, there are three important awards – the Third Interim Award on Jurisdiction, the First Partial Award on Track I, and the Second Partial Award on Track II.

The Awards must be read in light of the fact that the arbitration was, as per traditional arbitral principles, confined to the parties to or seeking to derive benefit from the BIT – Chevron, Texaco and Ecuador. The Plaintiffs in either set of the underlying proceedings were not parties.

Further, when an Ecuador-based and an international NGO petitioned to be allowed *amicus* status – because of the impact of the Arbitration on the Plaintiffs[18] – that petition was refused.[19]

As far as jurisdiction is concerned, the discussion turned on the relationship between arbitral principles and public international law. Starting with the proposition that the Tribunal has no jurisdiction without the consent of the State or the parties,[20] the Tribunal reasoned that as the underlying Plaintiffs were not parties to the Arbitration, the Tribunal could not have jurisdiction over them.[21] The Arbitral Tribunal then went on, however, to consider the impact of its rulings on the underlying Plaintiffs as a potential bar to jurisdiction. This was rejected as a bar to the Arbitral Tribunal's jurisdiction because any potential impact was not a jurisdictional question but one that turned on the final award and form of decision.[22] Finally, a contractual, private law approach was adopted to the actual issues. Those, the Tribunal decided, were solely between the parties to the Arbitration and if that meant that Ecuador infringed the rights of the underlying Plaintiffs, that would be a matter between Ecuador and them. Thus:

> *"The question for this Tribunal is in essence whether the Respondent has or has not violated rights of the Claimants under the BIT because of the way in which the Respondent has, through its organs, acted in relation to the settlement agreements. The question is one of the rights and obligations existing between the Claimants and the Respondent; and the Lago Agrio plaintiffs, who are not parties to the settlement agreements or to the BIT, do not have rights that are directly engaged by that question. If it should transpire that the Respondent has, by concluding the Release Agreements, taken a step which had the legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and the Respondent, and not a matter for this Tribunal."* [23]

> ***"It would be odd if International Investment Arbitration did not begin to recognise or consider the application of non-commercial concepts of public international law."***

This, it is submitted, is paradigm private law, arbitral reasoning and within the four walls of private law dispute would be entirely uncontroversial. When, however, one moves to the First Partial Award on Track I and the Second Partial Award on Track II, which began to deal with the merits, a different picture emerges.

The First Partial Award concerned the interpretation of a settlement agreement reached in 1995 between Texaco and Ecuador, which was governed by Ecuadorean law (in which none of the Tribunal was qualified).[24] The settlement agreement released Texaco from all claims arising under Article 19-2 of the Constitution of Ecuador, which guaranteed to each person *"the right to live in an environment that is free from contamination"* and provided that "[i]*t is the duty of the State to ensure that this right is not negatively affected and to foster the preservation of nature …"*[25] The question was whether the settlement also released Texaco from any claims individuals might have to enforce their *"diffuse rights"* under Article 19-2 (diffuse rights being *"indivisible entitlements that pertain to the community as a whole such as the community's collective right to live in a health and uncontaminated environment"*).[26]

The Tribunal held that individuals could still claim under Article 19-2 in respect of personal harm suffered as a result of environmental contamination.[27] However, all claims in respect of "diffuse rights" (which do not require a claimant to show personal harm) had been settled. The

Tribunal reasoned that, as at 1995, only the State could bring a claim under Article 19-2 in respect of diffuse rights, and therefore the State was entitled to – and did – settle all claims arising from those diffuse rights. Ecuador's Environmental Management Act of 1999 later gave individuals standing to bring claims in respect of diffuse rights, but by that time any claims against Texaco under Article 19-2 had been extinguished by the settlement agreement.[28]

By 2018, the Lago Agrio Claims had been through the Ecuadorean legal system (the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court) and the initial judgment had been upheld. In the Second Partial Award, the Tribunal itself subjected the first instance judgment to close scrutiny including, for example, the underlying evidence[29] and the credibility of the judge at first instance.[30]

The Tribunal found two treaty breaches. It found a breach of Article II(3)(a) requiring Ecuador to extend to investors fair and equitable treatment and treatment required by customary international law.[31] The Tribunal concluded that the first instance judgment had been *"ghostwritten"* for the judge in return for a possible financial reward[32] and that the subsequent appellate courts did nothing to reverse that position when, the Tribunal believed, they should have done so.[33] As a result of that, the Tribunal reasoned, there had been a denial of justice which could be attributed to the Ecuadorean State.[34] In reaching that finding, the Tribunal referred to a number of international human rights instruments concerning due process, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the UN Basic Principles on the Independence of the Judiciary.[35] The consequences were that the first instance judgment was declared unlawful and did not bind Chevron.[36] Further, Ecuador was to make full reparation to Chevron in respect of any injury caused by the enforcement or recognition of the first instance judgment.[37]

The Tribunal also found that Ecuador had breached Article II(3)(c) of the Treaty, an umbrella clause, on the grounds that it had failed to observe the release in the 1995 settlement agreement.[38] In other words, the Ecuadorean courts' finding that the Lago Agrio Plaintiffs' claims had not been settled was a breach of international law by the Ecuadorean State because the Arbitral Tribunal had decided that the claims *had* been settled. Chevron was entitled to full reparation for any losses suffered as a result.

Whichever way one examines it, *Chevron* was a stark case. If the Tribunal was right, then: (a) there was stark judicial corruption which the appellate courts did not rectify; and (b) four tiers of Ecuadorean courts had reached the "incorrect" conclusion on a question of Ecuadorean law regarding the settlement of causes of action under the Ecuadorean Constitution.

At the same time, one has a body firmly following a procedure developed in international commercial arbitration for private law disputes acting as though it was a fully constituted appellate court of the State – overturning domestic decisions and impacting the rights of non-parties to the proceedings.[39] Further:

a) this was a Tribunal doing so precisely in the arena of "diffuse" rights – in this case, access to a clean environment – which are heavily influenced by considerations of policy;

b) it reached a conclusion contrary to the Ecuadorean courts whose constitutional role it was to interpret those rights; and

c) it referred to international human rights instruments which appeal to diffuse rights (such as the Universal Declaration of Human Rights) only for the purposes of protecting Chevron and Texaco's economic interests in their investment.

A pause – Monetary Gold and International Investment Arbitration

The discussion in Chevron on jurisdiction touched on a decision of the ICJ - *Monetary Gold*.[40]

Monetary Gold concerned the repatriation of World War II gold – the UK and Italy wanted the gold but, in truth, the gold belonged to Albania, a State that was refusing to participate in the case. Therefore, an issue was the extent to which the ICJ could bind a non-participating State.

The ICJ held as follows:

> *"In the present case, Albania's legal interests would not only be affected by a decision,but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.*
>
> *It is also contended that any decision of the Court on the questions submitted by Italy in her Application will be binding only upon Italy and the three respondent States, and not upon Albania. It is true that, under Article 59 of the Statute, the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the Court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."*[41]

Thus, the ICJ held, there could be no jurisdiction in that case to decide issues that would affect Albania and Albania was a non-consenting party. At the State – State level, of course, *Monetary Gold* poses no difficulty. The cases at the ICJ are inter-State with those States representing by whatever route all applicable, domestic third parties.

At the International Investment Arbitration level, the position is more complicated. Not only is the basic arbitration that between a non-State Party (piggy backing on the State's Treaty) and a State – but in this area of social, political and human rights, it is probable that other parties' rights will be involved – indigenous groups and NGOs to name but two. It therefore falls to see how *Monetary Gold* has been applied in the context of international investment arbitration.

In *Chevron*, Ecuador relied on *Monetary Gold* to contend that the Tribunal did not have jurisdiction because non-consenting third parties would be affected by any Award. The Tribunal held that that it did not have to decide whether *Monetary Gold* applied because any third party issues were between those parties and the Respondent State.[42] Thus, on one view, at this stage, the Tribunal's views were inclusionary – it had jurisdiction to decide the wider environmental issues.[43] Yet, when one places that particular conclusion in the context of the decision as a whole, one sees that the Tribunal refuses the application for amici curiae in 2011; decides inclusive jurisdiction in 2012; and then in 2018 sets its face against *"diffuse"* social claims and does so while asserting that it was not adjudicating on the rights of the individuals who had initially brought those claims.[44] That seems, at first blush, problematic.

This question of third party rights and Monetary Gold was considered again in *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited*.[45] Here, the contractual dispute was between Niko and the immediate Respondent, yet the wider dispute embraced the Bangladeshi State and its National Oil Company – Petrobangla. The Tribunal reasoned as follows:

> *521. "In the present case the Tribunal is not called upon to adjudicate upon the responsibility of Petrobangla and Bangladesh. Its task is rather to determine the rights and duties of Niko and BAPEX in connection with the performance of the JVA. However, in the course of such a determination, it may have to consider issues in matters which Petrobangla and Bangladesh have assigned to BAPEX.*
>
> ...
>
> *524. As far as the people of Bangladesh or private third parties are concerned the Tribunal does not have jurisdiction, and therefore has no intention to adjudicate any claims they may have."*

Like *Chevron*, therefore, one has an assertion of an inclusive jurisdiction to consider issues where, insofar as the parties to the contractual arrangements purportedly so contend, third parties may be affected but the same disavowal of any intent to affect those wider third parties. This is a paradox.

The other side of the coin – Urbaser v Argentina

In *Urbaser SA & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*,[47] (*"Urbaser"*) the Tribunal took an alternative approach to human and environmental rights, considering them as rights that States might invoke against investors rather than other way around.

Urbaser was a standard International Investment Arbitration until the Republic of Argentina submitted a counterclaim with its Counter Memorial. In that, Argentina submitted that the Claimant investor had, by failing to invest, breached the *"basic human right to water and sanitation"*.[48]

The Claimant's immediate response was that, as BITs existed solely to protect the investor, there was no scope for a counterclaim by the State of this nature. Thus *"the asymmetric nature of BITs prevents a State from invoking any right based on such a treaty, not even a right to submit a counterclaim against an investor. The main aim of such treaties is, indeed, to protect the investor's rights... to grant the investors a one-sided right of quasi-judicial review of national regulatory action."*[49] This was a direct appeal to the historical perceptions of BITs as instruments solely to protect the investor. It was an appeal that the Tribunal rejected – at least as a matter of jurisdiction – by pointing to the breadth of the dispute resolution clause.[50]

When the Tribunal came on to the substantive merits, the Tribunal posed the question as follows:

> *"The question is then whether any host State's rights under the BIT shall be denied because of the very nature of BITs deemed to constitute investment law in isolation, fully independent from other sources of international law that might provide for rights the host State would be entitled to invoke and to claim before an international arbitral tribunal."*[51]

The Tribunal then went on to consider the wording of the BIT. Here the BIT stated that *"where a matter is governed by this Agreement and also by another international agreement to which both Parties are a party or by general international law, the Parties and their investors shall be subject to whichever terms are more favorable"*.[52] This, the Tribunal explained, imported general principles of international law and therefore the BIT could not be viewed as a set of rules in isolation.[53]

The Tribunal then moved onto the objection that a private corporation could not be responsible for compliance with human rights. To this the Tribunal said:

> *"A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore*

FOOTNOTES

FOOTNOTES

not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals."[54]

Part of this reasoning was that as the corporation qua investor could invoke international law, there was, of necessity, a two-way street. If the investor corporation could invoke international law, there was no reason in principle as to why international law could not be invoked against the corporation.

The Tribunal cross referring to *Guiding Principles on Business and Human Rights* then stated:

> *"The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual."*[55]

The Tribunal went on to hold that this would include the Universal Declaration on Human Rights then pithily saying *"The Declaration may also address multinational companies"*[56] before adding:

> *"it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights."*[57]

If this were thought to be the highwater of this section of the reasoning, it was not. The Tribunal, having considered the Vienna Convention on the Law of Treaties, the ICSID Treaty and the *ius cogens*, set out what it regarded as the norms of international law and concluded that such norms *"must certainly prevail"* over *"any contrary provisions of the BIT"*.[58]

That was, however, as far as this debate went. The Tribunal recognised that it was common ground that *"the human right to water and sanitation is recognised as part of human rights and that this right has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking water and sewerage services"*[59] before holding:

> *"However, this does not answer the question whether Claimants' as investors were bound by an obligation based on international law to provide the population living on the territory of the Concession with drinking water and sanitation services. Respondent does not, in fact, go so far. Indeed, it argues that such human right was incumbent on Claimants because providing for water and sewage was AGBA's and therefore its shareholders' obligation under the Concession. Even if this obligation could be imposed upon Claimants, Respondent does not state that such obligation is based on international law. It merely asserts that the performance obligation under the Concession had the effect of supplying the services that are part of the population's human right to access to water. Respondent also states that Claimants had violated human rights obligations clearly applicable to international companies. This argument does not reference any particular international law obligation, but relies only on AGBA's obligations based on the Concession Contract. And while Respondent correctly introduces the principle of pacta sunt servanda as a principle of international law, it identifies the relevant pactum as Claimants' obligation to invest in expansion work, thus relying again on the Concession Contract and admitting that international law does not provide a cause of action for the Counterclaim."*[60]

Thus, in part because the way that Argentina had framed its case, any supposed human rights obligation was transferred back into the private law arrangements between the parties. This was made clear:

> *"While it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law."*[61]

Once the dispute between the parties had been returned to the contractual arena, then any debate over a right to water had to be passed through that lens – as the Tribunal reasoned.[62] The result was that whilst there was a theoretical involvement of international law and soft rights, the analysis ultimately returned to the traditional arbitral ground of the contract wording.

Yet, the Tribunal also said this:

> *"The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case."*[63]

Thus, whilst the path to positive obligations lay through the Contract (at least insofar as the case in *Urbaser* was presented), the Tribunal left open the possibility that a negative obligation could be directly and positively enforced in an investment treaty arbitration.

Urbaser was considered in *David Aven v Republic of Costa Rica*[64] ("*David Aven*"). Putting aside the procedural debate over whether the counterclaims are strictly and legally factually linked to the claims[65] or whether the more liberal "based on" *Urbaser* test is applied,[66] the interesting aspect of *David Aven* is that the Tribunal spelt out when an investor might become subject to international law obligations under a Treaty.

It conducted a two-stage enquiry: jurisdiction then merits. At the first stage, The Tribunal examined Art 10 of the DR-CAFTA[67], which provided that a State Party could not be prevented from imposing environmental measures, and considered Costa Rica's argument that this provision imposed affirmative obligations on investors in international law – i.e. the provision elevated a State's domestic environmental measures to the plane of international law.[68] The Tribunal applied the *Urbaser* reasoning that, as investors had the benefit of international law, they could not be relieved of such obligations as international law may impose. Those obligations were particularly marked, the Tribunal found, in the environmental sphere which, relying on International Court of Justice caselaw, was to be treated as *erga omnes* (i.e. of common concern to all States).[69]

Thus, the Tribunal found that it would have *prima facie* jurisdiction over counterclaims brought by the State under Art 10 of the DR-CAFTA, and went on to consider the merits.[70] It was here that the claim failed. Properly interpreted, Art 10 of the DR-CAFTA did not in fact impose affirmative obligations on investors and, in any event, the counterclaim was raised too late in the proceedings to be admitted.[71] As with *Urbaser*, therefore, the claim succeeded in theory but failed in practice.

There is one other way in which international investment arbitration has taken account of human or environmental rights not by way of counterclaim but by denying the claim altogether – as simply not worthy of the protection of the BIT.

At around the same time of the Award in *David Aven*, was the Award in *Cortec Mining Kenya Ltd v Republic of Kenya*[72] ("*Cortec Mining*"). Here the Tribunal was considering a claim based on a mining licence issued by the Kenyan State. This mining licence was issued for Mrima Hill which was protected as a nature reserve, a forestry reserve and a national monument.[73] The claim failed (without a counterclaim) because the person granting the licence lacked jurisdiction so to do and the Claimant had failed to comply with Kenyan regulatory requirements including obtaining an Environmental Impact Assessment. This compliance failure led the Tribunal to apply the following test:

"If the investor corporation could invoke international law, there was no reason in principle as to why international law could not be invoked against the corporation."

What is emerging in the latest iteration of BITs is the direct application of non-commercial or soft rights by the words of the BIT itself.

"In the Tribunal's view, the interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State"[74]

As the Tribunal in *Cortec Mining* made clear, non-compliance with regulatory frameworks (here obtaining an Environmental Impact Assessment) was a *"serious breach of the "investors" obligations"* and showed *"serious disrespect for the fundamental public policies of the host country in relation to the environment and resource development"*.[75] This compromised *"a significant interest of the Host State"* which manifested *"a gravity to the act of non-compliance that is proportional to the harshness of denying access to the protections of the BIT"*.[76]

The approach in *Cortec Mining* has procedural and intellectual advantages. Procedurally, the debates over counterclaims and whether they can be brought is avoided. The claim fails within the four walls of the arbitration. Intellectually, there is no need to attempt to resolve the paradox of a private process determining the rights of others. The difficulty with *Cortec Mining*, however, is that it only works as a means to curtail further exposure by the State. The claim fails but there is no remedial payment from the investor for any past wrongs.[77]

The treaties

As can be seen, the wording of the Treaty at issue had a direct outcome on the deployment of environmental rights within the arbitration in *David Aven*. There the Tribunal held that, if the Treaty imposed affirmative obligations on investors, those obligations could be enforced by States by way of a counterclaim. What is emerging in the latest iteration of BITs is the direct application of non-commercial or soft rights by the words of the BIT itself.

The most interesting developments are those in relation to corporate social responsibility. Obviously this is not a concept which flows from international law and would reflect the softest of soft power provisions. Yet BITs are incorporating CSR wordings.

These wordings can range from the indicative to the more wide-ranging.

At the indicative end of the scale Art 16 of the Investment Agreement between Hong Kong SAR and Australia[78] provides:

> *"The Parties affirm the importance of each Party encouraging enterprises operating within its Area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party."*[79]

A slightly less indicative form of words can be found in the Belarus – India BIT[80] at Article 12:

> *"Investors and their enterprises operating within the territory of each Party shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anticorruption."*

At the more wide-ranging end of the scale, Article 14 of the Brazil – Ethiopia BIT[81] provides:

1. *"Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the post State and the local community, through the adoption of a high degree of socially responsible practices, based on the principles and standards set out in this Article and the OECD Guidelines for Multinational Enterprises (MNEs) as may be applicable on the State Parties.*[82]

2. *Investors and their investment shall endeavour to comply with the following principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State:*[83]

   a) *Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;*

   b) *Respect the internationally recognized human rights of those involved in the investors' activities;*

   c) *Encourage local capacity building through close cooperation with the local community;*

   d) *Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers;*

   e) *Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;*

   f) *Support and- advocate for good corporate governance principles, and develop and apply good practices of corporate governance;*

   g) *Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the investment and the societies in which its operations are conducted;*

   h) *Promote the knowledge of and the adherence to, by workers, the corporate policy, through appropriate dissemination of this policy, including programmes for professional training;*

   i) *Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;*

   j) *Encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and*

   k) *Refrain from any undue interference in local political activities.£*

Perhaps the most interesting set of provisions is, however, contained within the SADC Model BIT. The SADC Model starts by defining an investment as one which complies with the laws of the host state. Thus, the Model takes within itself the Kim – Cortec Mining principles – an investment which does not comply with the Host Statal law, is not an investment within the BIT and is not protected.

The Model then moves through:[85]

a) A common obligation against corruption (Art 10). Art 10.3 specifically provides that a breach of Article 10 is a breach of domestic law and therefore falls outwith the Treaty;

b) Under Art 11, both investors and their investment *"shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments"*;

c) Art 13 requires compliance with environmental and social assessment screening criteria and assessment processes. This is to be public and readily available at the local level. The assessments must also include assessments of the human rights of persons potentially impacted by the investment *"including the progressive realisation of human rights in those areas"*;

d) Art 14 allows for proportionate environmental management, planning and decommissioning;

e) Art 15 imposes minimum standards for human rights, environment and labour. In relation to human rights there is a direct duty on investors to respect them and not breach them – either directly or indirectly. As far as labour rights are concerned, there is a mandatory duty to act in accordance with the ILO Declaration. In respect of human rights, labour rights and environment, there is a levelling up of compliance – investors must not act contrary to the applicable domestic or international standards – whichever is higher;

f) Art 16 requires investments to meet or exceed national and international standards for corporate governance;

g) Art 17 provides for liability in the investor's Home State for acts, decisions or omissions in the Home State where those acts, decisions or omission lead to significant damage, person injuries or loss of life in the Host State; and

h) Art 19 allows breaches of the BIT to be taken into account in the assessment of the merits or the damages payable as well as for counterclaims to be made in the international investment arbitration. Art 19 also allows for direct claims to be made by the Host State and individuals and organisations within it against the investor for breach of the BIT.

As can be seen, the SADC Model BIT contains a whole suite of provisions covering corporate social responsibility, the environment, labour standards and human rights. These provisions are mandatory and imposed directly on the investor and the investment. Rights to claim for breaches of the provisions are given both in any international investment arbitration but also in the courts of the Home State and the Host State. Finally, if there is a breach of the Host State law, the investment is stripped of protection under the BIT.

As a document, the SADC Model BIT therefore marks a significant departure from previous treaty wordings. It is also significantly different from the BITs currently in place in Southern Africa.[86] The drafters have explicitly taken into account the various policy developments outlined above. Politically, the SADC Model could be said to represent a relocation of power away from the traditionally capital-exporting countries to the traditionally capital-importing companies.[87] Negatively, investor advocates would say that due to the need to price the risks of investor liability, the cost of investment will be higher and a greater price will be demanded of the Host State. On the other hand, and put positively, this might mean that Host States, seeing that they are protected from investor abuses, might well be more receptive to investment and less likely to impose protectionist countermeasures.

Legally, the SADC Model BIT studiously avoids the use of nebulous wording – that of best endeavours or guiding principles. Instead the language is of hard-edged obligations by reference to international and domestic standards. This drafting therefore represents a concerted effort to translate inchoate soft law principles into black-letter rights and obligations and does so at both the international and the domestic level. This has ramifications on many levels.

First, the SADC Model BIT undoubtedly breaks with the post-World War II consensus on international law and it does so both generally and specifically. Generally, the SADC Model bypasses the historic debates over monism versus dualism and/or over whether one can divine grundnorms in international law. Specifically, a considerable number of BITs have recognisable genetic origins in the limited Friendship, Commerce and Navigation Treaties entered into at the end of World War II. The SADC Model BIT manifestly does not.

Second, any international lawyer used to dealing with "soft" obligations has an understandable degree of cynicism as to whether those soft obligations can ever be deployed as concrete rights on which the client might wish to rely or obligations which can reliably said to have been breached. The SADC by deliberately avoiding the language of soft obligations is a deliberate retort to such cynicism. If the SADC Model BIT were adopted, then it would provide a platform for substantive arguments as to the meaning and implementation of international law provisions in a specific commercial context.

Third, that does, however, raise questions as to how Tribunals would deal with soft rights as and when they arise. The forays by Tribunals in allowing for soft rights have, whilst answering the questions in theory, either avoided the substantive question or found the case effectively "not proven". Other than the individual merits, there are we suggest four reasons for this:

a) **The status of companies under international law.** Cases like *Urbaser* and *David Aven* reflect the growing view that companies can have obligations under international law, but then fail to identify any affirmative obligations they might be subject to.[88] This issue would fall away if treaties like the SADC Model BIT were widely adopted, but that will be a slow process. Many States are reluctant to impose burdens on their companies for the benefit of third-party States.

b) **Parties and the scope of arbitration.** All practitioners in this area are familiar with the bilateral, confidential arbitration process. In the last decade, issues of joinder and tripartite arbitrations have had to be resolved.[89] The process, however, retains the essential elements of the private law procedure it inherited from international commercial arbitration (with some innovations, such as greater receptivity to amici curiae submissions).

c) **Expertise and familiarity.** There are a limited number of arbitrators that operate in this field. Many, if not most, have their background in commercial law and then the jurisdictional issues that arise in international arbitration and international investment arbitration. Many will not be familiar with soft rights and the issues that may arise in resolving claims which turn on soft rights.

d) **Transparency and accountability.** There has been a constant critique of international investment arbitration as being not-transparent and lacking the accountability to engage in questions of soft rights and policy.[90] The point is often made that such issues are better dealt with by the Courts which are transparent and accountable. One can see how a Tribunal selected from within the international arbitral community (which is in turn self-selecting) can be seen to lack accountability. Awareness of this lack of accountability may act as a self-denying ordinance precluding Tribunals from vigorous intervention in soft rights issues.[91]

"Any international lawyer used to dealing with "soft" obligations has an understandable degree of cynicism as to whether those soft obligations can ever be deployed as concrete rights on which the client might wish to rely or obligations which can reliably said to have been breached."

Conclusions

There is undoubtedly a nascent stream of jurisprudence supporting the incorporation and application of soft rules of international law in international investment arbitration. This is matched by proposed new wordings for BITs. It is, however, only nascent. It is reasonable to expect there will be further development in this area. Yet, the creation of a coherent approach to soft rights will always face difficulty given the ultimate tension between arbitration's private, contractual and commercial foundation and the "diffuse" rights at issue.

EXPERTS BEWARE!

By Philip Boulding QC

Philip Boulding QC considers the historical roots of expert witnesses and subsequent developments in caselaw in this article, which was in June published by the Society of Construction Law in Hong Kong.

The expert witness – historical beginnings and subsequent developments

Expert witnesses are now an accepted part of criminal and civil trials. However, the modern law of expert evidence proceeds upon the basis of an assumption that, in so far as the expert may express opinions or draw inferences, he or she does so by way of an exception to the rule that witnesses may only give evidence of what they have themselves perceived. This approach was articulated by Lord Mansfield in two eighteenth century cases, *Carte v Boehm*[1] and *Folkes v Chadd*[2]. In *Folkes v Chadd*, Lord Mansfield described the evidence of *"men of science"* as being admissible before the court, since which time the use of expert witnesses and the admissibility of their science has developed very substantially.

Folkes v. Chadd, which is also known as the Wells Harbour Case, is considered to have laid down the first rules on the admissibility of opinion evidence in the Common Law.

The case was first heard in 1782, though a written report of the proceedings was not produced until 1831, well after Lord Mansfield's death. Different experts had been heard about whether the position of an artificial embankment had caused the silting up of the harbour at Wells by the Sea, a town in Norfolk, England, and thus constituted a nuisance. Most of the experts had seen the harbour, but not the famous scientist Mr. Smeaton, whose evidence was thus initially deemed inadmissible.

On appeal with respect to the evidence of Mr. Smeaton, Lord Mansfield stated:

> *It is objected that Mr. Smeaton is going to speak not to facts, but to opinion. That opinion, however is deduced from facts which are not disputed – the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all the facts is, that mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbours, the causes of their destruction and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskill-fully navigating ships. The question depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is whether a defect arises from natural or an artificial cause, the opinions of men of science are not to be received. Handwriting is proved every day by opinion, and for false evidence on such questions a man may be indicted for perjury. Many nice questions may arise as to forgery and as to the impression of seal, whether the impression was made from the seal itself or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not taken. I have myself received the opinion of Mr. Smeaton respecting wills, as a matter of science. The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, men such as Mr. Smeaton alone can judge. Therefore we are of the opinion that his judgment, formed on facts was very proper evidence".*

Thus, Lord Mansfield laid down the rules for opinion evidence that have influenced Common Law jurisdictions, including Hong Kong, ever since. Opinions based on the facts of other people were considered several times in the 19th century and were deemed admissible. For example, in *Beckwith v. Sydebotham*[3], a case involving the seaworthiness of a ship called the *"Earl of Wycombe"*, Lord Ellenborough stated:

> *"Where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits. As the truth of the facts stated to them was not certainly known, their opinions might not go for much; but it was admissible evidence."*

More recently, in England the courts have approved Lord Mansfield's opinion in *Folkes v. Chadd* on several occasions. For example, in *R. v. Turner*[4] it was stated:

> *"The foundation of the rules was laid by Lord Mansfield CJ in Folkes v. Chadd (1782): 'The opinion of scientific men upon proven facts may be given by men of science within their own science'. An expert opinion is admissible to provide the court with scientific information which is likely to be outside of the experience of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is dressed up in scientific jargon it may make the judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion any more helpful than that of the jurors themselves; but there is a danger that they may think it does."*

Further, what constituted novel science was analysed by the English Court of Appeal in R. v. Robb by Bingham LJ as follows:

> *"The old academically established sciences such as medicine, geology or metallurgy and established professions … present no problem. The field will be regarded as one in which expertise may exist and any qualified member will be accepted without question as an expert. Expert opinions may be given of the quality of commodities, or the literary, artistic, scientific or other merit of works alleged to be obscene. Yet while receiving this evidence the courts would not accept the evidence of an astrologer, soothsayer, a witch-doctor or an amateur psychologist and might hesitate to receive evidence of attributed authorship on stylometric analysis."*

So far, so good!

Jones and Kaney – the 'tide turns' against experts

Almost 10 years ago, expert witness immunity was removed by the Supreme Court in the 'landmark' decision of *Jones v Kaney*[6,7]. The facts were stark. Mr Jones was claiming for the psychological after-effects of a road accident and instructed Dr Kaney as his expert. Her two reports were positive. In accordance with standard practice, the court ordered her and the other side's expert to agree a joint report. The joint statement was damaging to Mr Jones' claim because:

- It recorded the experts' agreement that his psychological reaction to the accident was no more than an adjustment reaction and did not reach a level of a depressive order or a post-traumatic stress disorder ('PTSD').
- It stated that Mr. Jones was deceptive and deceitful in his reporting and that the experts agreed that his behaviour was suggestive of "conscious mechanisms".
- It raised doubts as to whether Mr. Jones' subjective reporting was genuine.

Given the contents of the joint report, Mr Jones had to settle his claim at a lower amount than he had been expecting. When taxed by Mr Jones' solicitors as to why she had changed her position, Dr. Kaney admitted that:

- She had not seen the reports of the other side's expert at the time of her telephone conference with the other side's expert.
- The joint statement had been drafted by the opposing expert and did not reflect her views, but she had felt under pressure to sign it.
- Her true view was that Mr Jones had suffered from PTSD that had now resolved and that he had been evasive rather than deceptive.

Unfortunately, an attempt to get permission to put in evidence from a different psychiatrist failed and Mr Jones sought to sue Dr. Kaney for negligence. Dr Kaney relied in her defence on the centuries-old policy of protecting expert witnesses from being sued.

The Supreme Court's decision (by a majority of 5/2) was that expert witnesses are not immune from claims in respect of matters connected with their participation in legal proceedings, and the decision reversed authority dating back over 400 years and as to which the court expressed its surprise that the matter of immunity had remained unchallenged for so long.

FOOTNOTES

FOOTNOTES

The court, no longer convinced that experts would become unwilling to act for fear of being sued, held that the removal of immunity *"would tend to ensure a greater degree of care"*. Although the possibility was raised of treating the position of expert witnesses engaged in civil litigation differently from those engaged in criminal and family litigation, it is clear that the reasoning of Lords Phillips, Brown, Collins and Kerr admits of no such distinction or difference. Consequently, and unlike lay witnesses who have maintained their immunity, expert witnesses are now liable in negligence and/or for breach of contract and may be sued by disgruntled instructing parties. This followed the loss of immunity of barristers a decade prior in *Hall v Simons*[8].

As to the important question of who was an 'expert' from the perspective of immunity, Lord Brown made it clear that immunity from suit for negligence was only being withdrawn from an expert witness *"selected, instructed and paid by a party to litigation for his expertise and permitted on that account to give opinion evidence in the dispute"*. This type of witness was to be distinguished from the professional witness such as a treating doctor or forensic pathologist who may be called to give factual evidence in the case as well as being asked for their professional opinions upon it without having been formally retained by either party to the dispute. It would seem that this latter breed of professional (but still expert) witnesses retain immunity, the apparent logic therefor being that such professional witnesses do not voluntarily undertake responsibility to their employer/client since, in general, they are not paid any fee to attend court as a witness but are obliged to do so as part of their job.

As to the potential liability of a single joint expert, a direction for which is increasingly finding favour with judges in the Construction and Arbitration List in Hong Kong, as he or she voluntarily assumes duties to both parties (almost invariably for reward), the logic of the majority decision in *Jones v Kaney* would seem to be that either party (but in reality, the losing party) may sue such an expert for negligence and/or breach of the implied contractual duty to take reasonable care.

The Supreme Court in reaching its decision also considered both the duties owed by an expert to the court and his or her client, saying that whilst an independent and unbiased opinion falling outside a range of reasonable expert opinion would not be a breach of duty to the court, it could clearly be a breach of the duty owed to the expert's client. As to what fell within the *"range of reasonable expert opinion"*, in accordance with established principle this matter will be judged by reference to the standard of a reasonably competent practitioner of the relevant discipline.

The Supreme Court judges also identified other benefits to abolishing the immunity:

- The wronged client will enjoy, rather than have denied to it, a proper remedy.
- Abolition of the immunity should lead to *"a sharpened awareness of the risks of [experts] pitching their initial views of their client's case too high or too inflexibly"*.

Experience and the decided authorities show that there are two types of claim where the expert is likely to be particularly exposed in terms of breaching his or her duty to the client, namely where the expert is alleged to have:

- Failed to review a joint report so as to ensure that it reflected his or her views prior to signing it, so that significant concessions were inadvertently made in the litigation, as in *Jones v Kaney*; and/or
- Fundamentally changed his or her position.

Assuming that an expert is found to have breached his or her duty to the client, the claim to loss and damage will mirror to a great extent a claim against lawyers for negligent litigation advice, comprising damages for:

- Costs which would not otherwise have been incurred.

- The lost opportunity to obtain a better outcome.

Notably, notwithstanding concerns that the decision in *Jones v Kaney* would make expert witnesses reluctant to give frank evidence or act at all, there is little evidence of any such reluctance.

On the contrary, a leading firm of London professional negligence solicitors with a presence in Hong Kong has reported recently that a survey they were involved in of over 750 experts revealed that whilst just over 25% said they had considered giving up expert work, fear of being sued was a minor consideration after levels of pay and time restraints. Their experience, like mine, is that claims by a client against its expert are infrequent.

Where an expert has failed to read a joint report before signing it, which is surely going to be a rare occurrence, obviously such a palpable and significant error will result in the expert being liable for damages for the costs of the remedy and/or lost opportunity. However, where the claim is in respect of allegedly negligent concessions, there will inevitably be significant conceptual and evidential difficulties for a claimant to overcome. So, whilst *Jones and Kaney* type of claims against experts are of recent origin, expert witnesses can take comfort from the fact that such claims are likely to remain unusual.

By way of contrast, it is settled law that a witness of fact enjoys immunity from suit from any action by the party that calls them (or the opposing party) for anything said or done in court (whether in the form of oral testimony, in a witness statement or by adopting anything in a written statement as testimony). The reasons for this immunity are:

- To encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say.
- To avoid repeated litigation on the same issue.
- Absent immunity, witnesses would be reluctant to assist the court.

A Company and (1) X, (2) Y and (3) Z – even rougher seas

The background facts are important and warrant careful consideration.

The claimant in the High Court proceedings was the developer and owner of a petrochemical plant ('the Developer'). The Developer had contracts with various groups of companies for engineering, procurement and construction management services ('the EPCM Contractors'), and two contracts with another contractor ('the Works Contractor") for two contract packages for the construction of facilities for the plant.

Unfortunately, disputes arose out of delays to the construction works and the Works Contractor commenced an ICC arbitration seated in London with an English choice of law clause against the Developer for costs incurred by reason of delays to its works, caused in part by the late release of construction drawings from the EPCM Contractors ('Works Arbitration'). The Developer's position was that if it was liable to pay additional sums to the Works Contractor under their contracts as a result of the EPCM Contractors' late issue of the drawings, the Claimant would seek to pass on those claims to the EPCM Contractors.

The Developer approached the first defendant, X, an Asian subsidiary of a global consultancy firm which included the second and third defendants, Y and Z who were based in different countries, with a view to engaging it to provide delay expert services in connection with the Works Arbitration and on 15 March 2019 the first defendant, X, signed a confidentiality agreement with the Developer. The confidentiality agreement was subject to the laws of England and Wales and contained an exclusive jurisdiction clause for disputes or claims to be dealt with in the court of the Abu Dhabi Global Market.

By a formal letter of engagement dated 13 May 2019 which was signed by both parties, the Developer engaged the first defendant, X, to provide delay expert services in connection with the Works Arbitration. Importantly, this letter: was addressed to the first defendant, the Asian subsidiary referred to above, and identified the individual expert that would lead the team, be responsible for the report and testify at the hearing ('K'); stated that the scope of the engagement included providing ad-hoc support to the Developer and its professional team in the Works Arbitration; and, confirmed that the first defendant had no conflict of interest and would maintain that position for the duration of the engagement.

In the summer of 2019, the EPCM Contractors commenced ICC arbitration proceedings against the Developer, seated in London with an English choice of law clause ("the EPCM Arbitration"). In the EPCM Arbitration, the EPCM Contractors claimed sums due and owing to them under their EPCM agreements with the Developer. The Developer counterclaimed against the EPCM Contractors in respect of delay and disruption to the project.

The EPCM Contractors approached the three defendants (i.e. the same group of consultancy firms engaged by the Developer in the Works Arbitration) to provide expert services outside of Asia in quantum and delay in the EPCM Arbitration.

FOOTNOTES

The defendants notified the EPCM Contractors that they were already engaged by the Developer (albeit acting through another office) in another dispute on the same project; and notified the Developer that the EPCM Contractors were seeking to appoint them in the EPCM Arbitration. The Developer considered this created a conflict of interest contrary to the terms of its engagement with the first defendant. Further correspondence ensued but ultimately the second defendant company accepted the engagement and started work for the EPMC Contractors, working out of a different office and through another individual expert, 'M'.

On 20 March 2020, the Developer applied for urgent injunctive relief restraining the defendants from acting for the EPCM Contractors and on 23 March 2020 the matter came before the Court as an urgent *ex parte* application by the Developer but with informal notice given to the defendants.

The key issue for the court was to decide whether independent experts, who are engaged by a client to provide advice and support in arbitration or legal proceedings, in addition to expert evidence, can owe a fiduciary duty of loyalty to their clients, and whether such a fiduciary duty arose (and had been breached) in this case.

Having heard argument from leading counsel for the parties, but with limited evidence before the Court, interim relief was granted until 31 March 2020, the return date. An application was then made to continue the interim injunction, the basis therefor being that the provision by the defendants of services to the EPCM Contractors in connection with the EPCM Arbitration was a breach of the rule that a party owing a fiduciary duty of loyalty to a client must not, without informed consent, agree to act (or actually act) for a second client in a manner which is inconsistent with the interests of the first.

The defendants opposed the continuation of the interim injunction on the grounds *inter alia* that the Developer's application was misconceived as independent experts do not owe a fiduciary duty of loyalty to their clients, there was no conflict of interest and there was no risk that confidential information had been or would be disclosed to the EPCM Contractors.

The hearing was held in private because the judge considered it was necessary to do so to secure the proper administration of justice. This was because the application concerned two ongoing arbitrations and as such raised issues of confidentiality, not just of the parties before the Court but also of others who were not parties to the claim and consequently not before the Court.

The judge extended the interim injunction to restrain the defendants from acting as independent experts in separate, although related, arbitration proceedings against the Developer. Further, in extending the interim injunction, the Court held that:

(i) The expert firm's subsidiary engaged by the Developer owed a fiduciary duty of loyalty to its client but, in addition, that fiduciary duty extended to the defendant group (i.e. the second and third defendants) as a whole.

(ii) Putting in place information barriers did not satisfy the defendant group's fiduciary duty of loyalty as such measures sought only to preserve confidentiality and privilege and to address the risk that confidential information might be shared inappropriately, whereas a fiduciary with a duty of loyalty must not place himself in a position where his duty and his interest may conflict.

(iii) The defendant group had breached its fiduciary duty by accepting instructions to provide expert services in connection with the second arbitration without first obtaining the Developer's consent. Further, the Court's finding that the two arbitrations were concerned with the same delays, and that there was a sufficiently significant overlap in the issues, underpinned its conclusion that the defendants had breached their duty to the Developer.

Importantly, the court held that the first defendant, X, owed the Developer a fiduciary duty of loyalty because a clear relationship of trust and confidence had arisen because:

(i) The first defendant, X, was engaged to provide expert services for the Developer in connection with the Works Arbitration.

(ii) The first defendant had been instructed to provide an independent expert report and to comply with the duties set out in the CIArb Expert Witness Protocol as part of its engagement.

(iii) The first defendant was also engaged to provide extensive advice and support for the Developer throughout the arbitration proceedings.

The parties were in agreement as to the principles governing fiduciary relationships. In determining whether the defendants owed a fiduciary duty of loyalty, the judge considered the definition of a fiduciary as set out in *Bristol & West Building Society v Mothew*[9], a case concerning the fiduciary obligations owed by a solicitor acting for both parties to a property transaction. In this cases Millett LJ had stated [p.18]:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; …he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal …*
>
> *A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other … This is sometimes described as "the double employment rule." Breach of the rule automatically constitutes a breach of fiduciary duty …"*

"A fiduciary with a duty of loyalty must not place himself in a position where his duty and his interest may conflict."

Prior to this case, the recognised classes of fiduciaries were limited to trustees, guardians, executors, administrators, agents, doctors and lawyers – so the addition of experts to that list might be considered somewhat unusual and it is understood that the defendants are seeking permission to appeal.

As to the question of whether the individual expert's fiduciary duty extended to the whole defendant group, the Court referred to previous cases that established that where a fiduciary duty of loyalty arises it is not limited to the individual concerned, but rather it extends to the firm or company, and may extend to the wider group: *Prince Jefri Bolkiah v KPMG*[10]; *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer*[11] ; *Georgian American Alloys v White & Case*[12].

In this latter context the court also considered and was no doubt influenced in its decision by the organisational structure of the defendant group, noting the common financial interest of the parent company and its shareholders in the defendants, that the defendant group was managed and marketed as one global firm, and that there was a common way in which conflicts were identified and managed.

The defendants' submission that an expert witness did not owe a fiduciary obligation of loyalty to his or her client as such a duty of loyalty was excluded by the expert's overriding duty to the tribunal by reference to cases such as: *Prince Jefri Bolkiah v KPMG*[13]; *Harmony Shipping Co SA v Saudi Europe Line Ltd*[14]; *Wimmera Industrial Minerals Pty Ltd v Iluka Midwest Ltd*[15]; *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited*[16]; *A Lloyd's Syndicate v X*[17]; and, *Jones v Kaney*[18] was rejected on the basis that such authorities could be distinguished. Notwithstanding, and helpfully in terms of explaining and clarifying an expert's duties and functions, the Court distilled the following general principles from the authorities referred to by the defendants:

(i) In principle, an expert can be compelled to give expert evidence in arbitration or legal proceedings by any party, even in circumstances where that expert has provided an opinion to another party: *Harmony Shipping*.

(ii) When providing expert witness services, the expert has a paramount duty to the court or tribunal, which may require the expert to act in a way which does not advance the client's case; *Jones v Kaney*.

(iii) Where no fiduciary relationship arises, having regard to the nature and circumstances of an expert's appointment, or where the expert's appointment has been terminated, the ongoing obligation to preserve confidential and privileged information does not necessarily apply to preclude an expert from acting or giving evidence for another party; *Meat Traders; A Lloyd's Syndicate; Wimmera*.

The Court then went on to note that none of the authorities referred to by the defendants supported the proposition

that an independent expert does not owe a fiduciary duty of loyalty to his or her client. Indeed, no fiduciary duty of loyalty existed in those cases because either there was no retainer (at all, or because the retainer had been terminated), or the particular facts of any retainer did not give rise to such a relationship. Further, as to the defendants' reliance on their independent role, the Court noted that merely because experts owed duties to the Court or tribunal that may not align with their client's interests, such fact did not provide a principled basis to support the general rule contended for by the defendants.

The Court dismissed the defendants' submission that the defendant group was analogous to barristers who *"act on opposing sides in litigation as a matter of course"* pointing out, by way of example, that unlike a firm of experts barristers do not share profits and do not have the *"luxury of considering a case and then deciding not to accept instructions because the client or case does not fit their corporate image"*. In dismissing this aspect of the defendant's submission, the Court also stated that it is *"common knowledge"* that barristers are self-employed individuals and that counsel from the same chambers may, and often do, act on opposing sides of the same case.

"Importantly, the defendants did not inform the Developer at the time of accepting the engagement that they might take instructions to act both for and against the Developer in respect of the dispute".

The implication of this aspect of the judgment seemed to be that there is no such *"common knowledge"* in respect of expert witnesses, and informed consent is required in circumstances such as those under consideration in the case – which was not forthcoming. Importantly, the defendants did not inform the Developer at the time of accepting the engagement that they might take instructions to act both for and against the Developer in respect of the dispute. If they had done, the court reasoned, the Developer would not have instructed the defendants (as evidenced by the fact that when the defendants asked whether the Developer objected to them acting for the third party, the Developer objected).

Whilst the judge did not decide that *all* experts owe their client a fiduciary duty in all circumstances, the Court confining its decision to the circumstances in which an expert is retained could give rise to such a duty, nevertheless the implications are clear – *a fortiori* given that the judge went on to find not only that the first defendant owed such a duty to Developer but that the defendant group owed such a duty thereby potentially precluding employees of other companies within that group from acting for anyone against the Developer. That is obviously very broad-reaching and as expert services firms have become much more multi-disciplinary in nature, it is likely to present real hurdles in practice.

The case of *A Company v X, Y & Z* will not be welcomed by consultancy firms providing multi-disciplinary expert witness services. Notwithstanding, it contains a very helpful guide to the duties and obligations of expert witnesses to their clients in circumstances where such witnesses regularly give evidence in construction cases on matters concerning technical issues, programming and quantum to name but a few and form a crucial part of a team engaged by a client.

Importantly, in circumstances where expert witness services are increasingly provided by large, very commercial global entities in a very competitive 'industry', this case serves to emphasise just how important it is for a provider of expert services to investigate thoroughly the matter of conflicts of interest at the very outset of any expert appointment (including across global affiliates) and for a client seeking expert services to give very careful consideration to the terms on which it appoints its experts. The case is also a salutary reminder for lawyers and experts to deal with conflict issues conclusively as soon as they arise, and perhaps more cautiously than they did before, not least to see whether sensible discussions can result in an agreement that everyone can live with.

It is also important that providers of expert services take legal advice on their terms and conditions of engagement to ensure that they deal adequately and expressly with the issue of conflicts and the circumstances in which any fiduciary duty of loyalty, which is a very serious matter, comes into existence. For example, whilst experts will have undertaken appointments on the basis of owing a duty of confidentiality to their appointing party, prior to this decision it is unlikely that they will have considered owing a duty of loyalty to such party which goes well beyond the ordinary criticism that could be levied at an expert for a lack of independence.

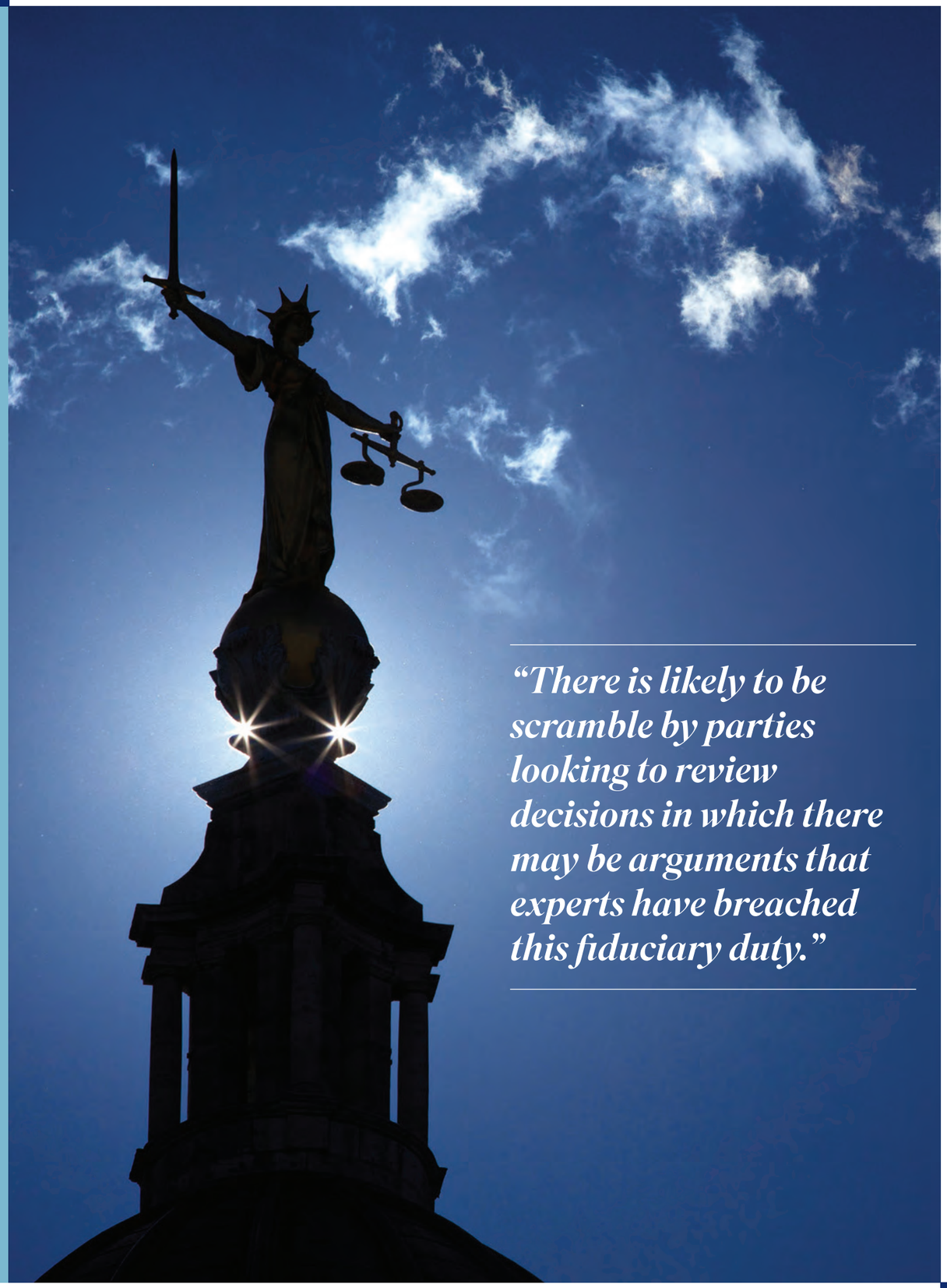
It also bears emphasis that where an expert owes a fiduciary duty of loyalty, the implementation of measures such as information barriers, which are aimed at preserving confidentiality and privilege will not serve to satisfy such a duty. Where such a duty is owed, and if an expert is considering acting for a party which may give rise to a conflict between his duty and his interest, the expert must obtain the informed consent of both parties before agreeing to act.

The Court's decision also raises important practical implications for experts and, in particular, global consultancies providing such services in that once an expert or consultancy undertakes any substantial work for a party, they need to very carefully consider the fiduciary duty of loyalty that they owe to that party and refuse to accept other instructions that would be in conflict with that duty. Obviously, that would include, as in this case, instructions from another party in proceedings against the instructing party concerning the same project and may even have broader implications.

It also follows that expert firms should carefully consider whether there is any degree of overlap between related, although independent, arbitrations before accepting instructions in a related matter when they already act for one relevant party.

The practical implications of this decision is that once a consultancy undertakes any substantial work for a party, it needs to very carefully consider the fiduciary duty of loyalty that it owes to that party and not accept other instructions that would be in conflict with that duty. That would obviously include, as here, instructions from another party in proceedings against the instructing party concerning the same project and may even have broader implications.

Notably, being subject to a fiduciary duty is a very serious matter. Experts will have undertaken appointments on the basis of owing a duty of confidentiality to their appointing party and will not have considered owing a duty of loyalty which goes well beyond ordinary criticism that could be levied at an expert for a lack of independence. This will result in uncertainty and excessive cautiousness going forwards and likely a state of panic in ongoing proceedings that involve experts that could be said to be in breach of that duty. There is likely to be scramble by parties looking to review decisions in which there may be arguments that experts have breached this fiduciary duty.



"There is likely to be scramble by parties looking to review decisions in which there may be arguments that experts have breached this fiduciary duty."

THOUGHTS ON REMOTE HEARINGS: INTERVIEW WITH JUSTIN MORT QC

Marie Sparkes
(BD & Marketing Manager)
and
Elle Ashman
(Marketing Executive)

Marie: Good morning Justin.

Justin: Hello Marie, hello Elle

Marie: So we're all here to talk about remote hearings but before we dive in, how have you adapted to life in lockdown generally? I know you're a keen runner; have you managed to keep up with that this year?

Justin: Luckily someone suggested a chambers running club at the start of the first lockdown which Dominic [*Woodbridge*] set up on Strava. So, every day I can see if I am running as far or as fast as my friends

Elle: The mix of competition and support must help a lot with motivation. The camaraderie at Keating during lockdown over virtual networks has been great.

Marie: I completely agree. Remote working for us has been much easier and more effective than I would have envisaged at the start of lockdown.

So, Justin, you've been involved in a number of remote trials and hearings recently during lockdown. What has your experience of them been like so far?

Justin: I suspect that most people's experience of remote trials follows much the same trajectory. Initially there is a little concern about the novelty of it. After a short while one wonders why trials were conducted by any other method, or at least why a remote hearing should be remarkable.

Both of my trials during lockdown were conducted from Chambers, but with my instructing solicitors and clients located elsewhere.

In one of the cases I also had a junior, socially distanced, in my room. For me the principal advantage of a remote hearing for me was her uncontrolled smiling – off camera – when a cross-examination came out particularly well. I do not recall any junior doing that in a conventional hearing, although I accept that that could be for other reasons.

Marie: Has it been your experience that virtual hearings have saved time?

Justin: Obviously conducting a trial from your room in Chambers has a number of what may seem trivial advantages over conducting a trial in a court room or arbitration centre.

It is not necessary to be anywhere or to go anywhere. In the morning you go to your workplace; at 10am or 10.30 the hearing starts. You just need to ensure that by that time you have successfully accessed the relevant link, and that you are suitably attired for a formal hearing, or such part of you as may be on camera. You do not need to queue for court security, or to arrange for anything to be brought to and from the court room each day.

Whilst this is a trivial advantage in the general scheme of things, I found it beneficial not to have to interrupt my preparations for the day's hearing with the admin of getting to the venue in good time.

Sitting in chambers one also has the support of the tireless staff, printing facilities and other benefits of chambers immediately to hand.

Elle: Besides proximity to the Chambers' stationery cupboard are there any more substantial advantages to a remote hearing?

Justin: You have as much working space as you need. Whilst you need screens in order to conduct a remote hearing, in practice you need almost the same number of screens to conduct a typical construction trial in person. In a remote hearing you are not having to share limited working area with a large number of other people.

Marie: Anything more substantial?

Justin: At the risk of stating the obvious, anyone can attend a remote hearing relatively easily.

Non-parties can attend hearings held in public without having to travel. Similarly party representatives (company directors or equivalent) can attend for crucial parts of the case without inconvenience.

At a time when the Commercial Bar is looking at how it might improve the diversity of its intake there is potential benefit here – for example by encouraging students to attend TCC hearings remotely without the expense of having to stay in London for a mini-pupillage.

Elle: Yes, we have found the same with being able to offer mini-pupillages virtually. It is sometimes suggested that preparation for a remote trial has to be more thorough or more comprehensive than for a physical hearing. Has that been your experience?

Justin: I have heard this said, and that there is perhaps less scope in a remote hearing for say a hasty consultation with the client or one's expert during a 10 minute break.

I am sure that that is a valid consideration in some cases. But it was not my own experience in my cases to date (I should say, I had immense assistance from first rate law firms in both cases such that nothing was left to chance in either case).

In the TCC trial (*Premier v MW*) the other side was permitted to serve a witness statement made by a new witness in the middle of the hearing, covering new topics. Whilst we had to prepare that witness's cross examination during the trial, I didn't feel that that exercise was made any more difficult by my being remote from the remainder of my team. Given the nature of the issue addressed in the witness statement (essentially, the preparation and explanation of a vast spreadsheet), it was easier being able to look at the same material (remotely) on a shared screen. I can't envisage attempting to carry out such an exercise say in the corridor outside court 22.

Marie: Do you feel that there were technological advantages to remote hearings then? Is that your experience?

Justin: For me a more significant change in trial practice was the movement, a couple of years or so before the pandemic, from trial bundles that were entirely or largely hard copy to the use of e-bundles for some if not all of the hearing bundle.

That has nothing to do with COVID or the requirement to conduct trials remotely as such, although of course the use of e-bundles is necessarily yet more widespread and more comprehensive in 2020 than before.

Arguably the use of e-bundles does impose some discipline upon the advocate in terms of the advance preparation of every last detail (eg if the person operating the e-bundle requires document references long in advance). Possibly e-bundles involve slightly more preparation than hard copy bundles.

But in my experience the remote hearing works much better with an e-bundle because in a remote hearing everyone is necessarily looking at documents on a screen.

The overwhelming benefit of the remote hearing (besides the ten minute saving in travel time) is the ability for the advocate to share his or her screen during either cross examination or submissions, rather than depending upon the e-bundle operator to find as it may be a specific cell in a large spreadsheet or the equivalent.

Elle: But how have you found the process of cross-examining a witness remotely compared to in person?

Justin: In my mind there are two modest advantages to the remote hearing when it comes to witness evidence.

Firstly: the ability to share your screen with the witness means that as an advocate you have more control over the cross-examination process, and in particular the pace of the cross examination.

If the documents are entirely fielded by the e-bundle provider it should make no difference whether the cross examination is conducted remotely or in person. But in my experience there are inevitably occasions when as an advocate you want to take the witness to specific parts of a drawing, or technical data, or spreadsheet.

Secondly with my remote trials I felt able to see the witness and their reaction in much more detail (regardless of the quality of the internet connection) than would be the case in a physical hearing.

There were a couple of occasions in particular in each of my trials where a witness's physical reaction to a question was particularly visible on the screen. (Obviously the reaction is itself not on the transcript; and you do not know that the tribunal is also looking at the witness at the time. But it is simple enough to get it onto the transcript).

In the High Court the witness box is positioned almost immediately adjacent to the position of one advocate, and some distance away from the other. I have always thought that that gave some advantage to the advocate next to the witness. (If anyone disagrees, try proposing such an arrangement in an arbitration hearing).

Marie: How about any other disadvantages to remote trials?

Justin: There are some negatives. First, one is dependent upon the technology working. It is probably necessary to set aside some float time against the possibility of time being lost; there is a high risk if one has not done so. But equally in the case of a remote hearing, less is involved in reserving time for a hearing since no one has to go or stay anywhere different to their normal location.

In addition there is likely to be less interaction with your opponent. Obviously the loss of human contact is an unavoidable feature of remote working more generally. Ongoing contact with an opponent during a trial process is necessary if only to keep everyone on speaking terms and to maintain the required atmosphere of cooperation. But that is easily addressed without having to congregate together.

Elle: Any final comments?

Justin: Overall the experience has been good, particularly as a result of the positive attitude of the TCC staff and judiciary, and all practitioners.

Elle: Thanks Justin

Marie: Thank you Justin.

Justin: Happy Christmas to all our readers.

THE INTERNATIONAL CONSTRUCTION LAW CONFERENCE

"I have been very impressed by the co-operation and flexibility shown by the parties, by their legal representatives, by the experts and by the court staff to ensure that the wheels of justice could keep turning."

The International Construction Law Conference took place on 10 September.

Initially intended to be a fringe event during the second London International Disputes Week, like many of 2020's events the Conference changed format in response to Covid-19. The result was a virtual 1-day conference uniting international construction law practitioners from 24 leading law firms, chambers and expert consultancies, along with a number of senior in-house lawyers and industry experts. That alone was an unprecedented piece of co-operation. The entire day was hosted and managed on a virtual basis by Kings College London who stepped in when an in-person event was no longer possible. 3,450 delegates from around the world signed up to watch and during the day between 400 and 1,000 people were tuning in at any one time.

The keynote speech was provided by Mrs Justice O'Farrell DBE, Judge in Charge of the Technology and Construction Court ('TCC'). The TCC is part of the Business and Property Courts of England and Wales ("BPC") introduced in 2017. In London, the BPC is based in the Rolls Building and comprises the commercial court, admiralty court, and the chancery division in addition to the TCC.

Mrs Justice O'Farrell included reference in her keynote to how the TCC has responded to Covid-19.

She explained that on 23rd March 2020 when UK lockdown was announced, the TCC issued template orders and draft letters to be sent to all the parties for remote hearings. Within a few days a protocol was in place for remote hearings for all jurisdictions of the High Court. There were only a small number of trials adjourned in the TCC which were heard in vacation or re-listed for early 2021. Other than that, all hearings went ahead as originally listed save that they were remote, usually by video link.

She added that new cases in the TCC increased by 6% in the first 6 months of this year. That is on top of the overall increase the previous year of 20%.

Since the beginning of July, the courts in London have been offering hybrid hearings or full physical hearings in court where it is appropriate in agreement with the parties.

Mrs Justice O'Farrell concluded her keynote by saying:

> *"I have been very impressed by the co-operation and flexibility shown by the parties, by their legal representatives, by the experts and by the court staff to ensure that the wheels of justice could keep turning. I think we have benefitted from learning how to use technology, for example this conference, to improve the efficiency and cost of legal proceedings in general without compromising justice. We do recognise the value of continued physical hearings and physical meetings where appropriate but I think this has served to demonstrate the resilience and the agility of the courts in England & Wales generally, and in London in particular. The Courts in London and, in particular, the TCC, are ready to welcome parties from all over the world to resolve their disputes."*

Click here to listen to recordings from the International Construction Law Conference

https://www.youtube.com/playlist?list=PLW9PMidnRP0FUCQgjgsF-Q8zKrpjxrfMq

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