# KC LEGAL UPDATE

Spring 2021

**In this issue...**



KEATING CHAMBERS

# WELCOME

## to the Spring 2021 Edition of KC LEGAL UPDATE

## Richard Fernyhough QC

**Richard Fernyhough QC retired from Chambers, with effect from 1 January 2021. Richard started his career as a pupil at Keating almost 50 years ago, serving as Head of Chambers between 1997 and 2002, cementing his place in our history. He took silk in 1986, sat as a Deputy High Court Judge from 1992, was a former chair of TECBAR's predecessor, ORBA, and later became an internationally renowned Arbitrator.**

Former Head of Chambers, Marcus Taverner QC, had the following words to say about Richard:

*"Richard was part of the group that built the solid foundations on which Chambers now stand, and most importantly he nurtured its ethos and culture. He was pupil master to many of us, myself included, and he taught us not just about the law but the traditions and practice of the Bar. Those who were privileged enough to see him on his feet in court were more than impressed and influenced.*

*To many, over the years, he remained not just a friend and confidant but the benchmark of the right approach to all the dilemmas a barrister faces during professional life. Richard is a man of thought, intellect and wisdom. He grew to become the ultimate 'Eminence Grise'. Most importantly, Richard promoted kindness and courtesy.*

*I extend our warmest congratulations on a fabulous and successful career and our very best wishes for the future ahead."*

In his announcement to chambers, Richard reflected on his career which started in late 1971 at 11 King's Bench Walk and extended his thanks to all those who have been part of his time at Keating:

*"At that time there were 15 members of chambers, no silks and the Head of Chambers was a retired army officer who did a lot of criminal work in Surrey. It was a modest common law set which did every conceivable type of common law work, but very few "building cases", as we called them.*

*Now there are 31 silks and 35 juniors in chambers and we are known as the pre-eminent set of barristers' chambers specialising in Construction Law. It is true that the Bar has gone from strength to strength over the past 50 years, but even so the story of the transformation of a modest common law set into Keating Chambers is a remarkable one.*

*It would not have happened without the late Donald Keating QC to whom we owe an enormous debt of gratitude. Donald looked upon chambers as an extended family of like- minded individuals. And today, even though that family has grown rather more than anyone expected, that same ethos still persists.*

*I would especially like to thank the clerks, past and present, the admin staff and all the other people in chambers who have contributed so greatly to the success of chambers. I have always regarded representing others as a real privilege, and I consider myself the most fortunate of men to have been able to do that from Keating Chambers."*

Head of Chambers, Alexander Nissen QC has since announced that Richard will remain a part of the Keating family as one of our Honorary Associates, as voted upon by the whole of Chambers.

*"On behalf of everyone past and present at Keating, I would like to thank Richard for his friendship, support and leadership. We are delighted that he will keep his association with us and look forward to being able to celebrate his career in person when we can."*



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# CHALLENGE TO HS2'S £1 BILLION PROCUREMENT DEFEATED ON MULTIPLE FRONTS

**By Sarah Hannaford QC, Simon Taylor and Ben Graff**

## Bechtel Limited v High Speed Two (HS2) Limited [2021] EHWC 458 (TCC)

Judgment was handed down on 4 March 2021 by Fraser J in the claim arising out of the HS2 procurement for the construction partner contract for Old Oak Common Station (one of the two Southern Stations on the HS2 network), a project with an 'incentive target' cost of over £1bn. The contract was awarded to BBVS, a consortium of bidders including Balfour Beatty Group Ltd, Vinci Construction (UK) Ltd, Vinci Construction Grands Projets and Systra Ltd. An unsuccessful bidder, Bechtel Ltd, challenged the outcome of the procurement.

Bechtel scored 73.76% compared to BBVS' score of 75.38% and was ranked 2nd but had a substantial bid qualification. The Judge noted that Bechtel scored 5.76% on the 'Lump Sum Fee' bid (overheads and margin) as compared to the maximum 10% awarded to BBVS. In effect, this accounted for the ranking. Bechtel scored higher on quality but lost overall due to its price.

## The Issues

Bechtel alleged that there were manifest errors in scoring and inadequate records of the assessment and moderation process in breach of the transparency principle. The focus of its case was that the BBVS' bid ought to have received a score of 'Major Concerns' for a question relating to organisation (E001), rather than the score of 'Concerns' awarded, because the proposed level of resources was too low. Had BBVS been scored as Major Concerns for E001, this could (and Bechtel said should) have led to its disqualification under the tender rules. Bechtel argued that the relatively high scores for the other technical questions were inconsistent with the Concerns over BBVS' resourcing.

Bechtel also alleged unequal treatment in the evaluation of certain questions and that there was 'downward pressure' exerted by moderators and legal advisers (by way of a moderation assurance process) on certain Bechtel scores. It claimed that the winning bid was abnormally low due to a lack of resources and ought to have been disqualified.

Finally, Bechtel alleged that the winning bid and the contract entered into with the winning bidder had been unlawfully modified and that reassurances as to resource levels provided by BBVS at a post tender meeting were impermissible. Bechtel argued that changes made to the project programme due to the passage of time between the anticipated contract start date and the actual start date (about 1 year) and overall HS2 project changes ought to have led HS2 to invite revised bids.

HS2 denied all allegations and argued that the claim did not cause any loss because Bechtel would, if it had come first, have been disqualified from the competition anyway by HS2 for failing to remove a fundamental qualification from its bid.

The trial on liability and causation took place in person in October to November 2020 before the 2nd Covid lockdown. 18 witness were called over a 3 week period.

## The Court's Role

Fraser J commented on the nature of judicial oversight in procurement cases, noting that it is exercised with restraint. Proceedings are not an appeal against the tender outcome of the decision and the Court will only interfere with evaluation if there is manifest error. This is a high threshold and another way of expressing irrationality. The Court will give *"suitable recognition to the institutional competence of decision-makers"* and recognise the competence of the Subject Matter Experts (SMEs) charged with the evaluation of bids. Procurement law does not impose a counsel of perfection on contracting authorities.

The judge also commented on confidentiality and redactions in particular, noting the importance of transparency and the need to minimise and explain (in a schedule) any redactions made to documents and witness statements. While he considered that some documents relied on at trial had been over-redacted (certain redactions were removed during the trial), he did not consider that this interfered with the fair disposal of the issues.

On the Bechtel evidence, Fraser J referred to *Healthcare at Home v Common Service Agency* [2014] UKSC 49, noting that the evidence of a particular tenderer's understanding of the tender documents is irrelevant. What matters is how the reasonably well informed and normally diligent (RWIND) tenderer would interpret them. Equally the views of a Claimant witness on how its bid or another bid should have been evaluated will not be of relevance to the Court's determination of the issues.

## The Judgment

Fraser J rejected substantially all of Bechtel's arguments and its case failed completely.

### Evaluation, moderation and scoring

The issue of whether there was manifest error in the scoring of E001 came down to the difference in the scoring guidance between a finding of 'significant risk' (Concerns) and 'substantial risk' (Major Concerns). This was held to be a subjective judgment of the HS2 evaluators based on their expertise and experience and it was not the role of the Court to interfere with judgment calls reached after hours of discussion at a consensus meeting.

Bechtel sought to elevate the importance of the draft initial scores reached by the evaluators and objected to its scores on those questions where the draft score of one or other evaluator was higher than the moderated score. Fraser J found that this was how moderation was designed to work – assessors discussed their views of the response and arrived at a consensus score. The fact that it might be different to their draft score did not matter and certainly did not establish manifest error. The process was set out in the Invitation to Tender ("ITT").

On the evidence and documents, Fraser J held not only that HS2 made no manifest errors in the evaluation of bids, but also that it made no errors at all and there were no instances of breach of equal treatment or transparency in the evaluation of bids. The alleged errors were no more than subjective disagreements from Bechtel and there is *"no judicial remedy for subjective dissatisfaction at losing a procurement competition"*. He rejected Bechtel's argument that evaluators ought to have considered the 'practical achievability' of BBVS' response to the various technical questions in light of the scoring of E001 as this would change the entire scoring methodology.

### Record-Keeping, Moderation Assurance and the Clarification Meeting

On record-keeping and transparency generally, Fraser J considered the standstill letter issued by HS2 to be *"extraordinarily comprehensive"*, the evaluator training to have been very thorough and the records of the evaluation process to be sufficient. The moderation records did not for example need to be verbatim accounts. He found that there was no duty of 'good administration' on HS2 and that the procedural burden on authorities is balanced and limited by the EU principle of proportionality.

HS2's record keeping was held to fall below the required standard in only one respect, in that it failed to keep a proper written record of a post tender clarification meeting with BBVS. This was a technical breach of the transparency principle but had no causative effect and did not assist Bechtel's claim. It was markedly different to the widespread failure of record keeping on the evaluation of bids in *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] WHC 1589 (TCC). There was no basis here to set aside the award decision based on this 'de minimis' breach. To do so would be disproportionate.

Fraser J rejected the argument that the 'moderation assurance' checks carried out interfered with or applied downward pressure on the scores as there was no evidential basis for this allegation either in the emails or the cross examination of HS2's witnesses.

As to the clarification meeting, he concluded that this was provided for in the ITT and permissible. Given the score of Concerns for E001 it was sensible for HS2 to seek clarifications on resource levels, but the score was not conditional upon those clarifications as the scores were already finalised.

### Abnormally Low Tender

There was no basis for any finding that the bid was abnormally low. The concept of an abnormally low tender has to be considered by reference to the particular contract to be awarded, the work involved and the way that costs and prices are calculated. While resources were an element of the tender they did not feed into the price bid. Furthermore, HS2 had set a 'fee collar' or lower limit on the lump sum fee in the ITT and the BBVS' fee was above that limit. HS2 had also performed a review of the staff rates bid. There was no discernible error in HS2's finding that the BBVS' tender was not abnormally low.

### Material Change

On the alleged material changes, Fraser J agreed with HS2 that the ITT permitted changes to project dates and noted that it would be extraordinary if it did not, given the nature of the project. The judge accepted HS2's submission that the Utilities Contracts Regulations 2016 ("UCRs") allowed flexibility in the conduct of negotiations with the preferred bidder. While the project was slightly different to that tendered for in terms of programme dates, this was entirely to be expected. The fact that tenderers might have submitted different bids had they bid against different project dates was hypothetical and irrelevant.

### Qualification

Fraser J also found that in the event that Bechtel had been ranked as the winning bidder, it would have been disqualified from the competition by HS2 for failing to remove a fundamental qualification from its bid, despite repeated requests to do so. That qualification would have shifted the financial risk profile of the Contract substantially to the detriment of HS2 by giving Bechtel the right to terminate the contract after the station design had been completed if it then felt unable to deliver the contract to the incentive target. Bechtel's case therefore also failed because it could not show that any loss had been caused by the alleged breaches given that it would have been disqualified in any event.

*"The temptation of an unsuccessful bidder to pursue litigation because it disagrees with the scores awarded should be resisted."*

### Commentary

Every case is decided on its facts and this procurement was, as Fraser J concluded, a competition working fairly. However, there are a number of points that can be taken from this judgment. These include:

First, the temptation of an unsuccessful bidder to pursue litigation because it disagrees with the scores awarded should be resisted. A claimant has to show manifest error (ie irrationality) in the scoring or some other breach which caused it loss. The court will recognise the expertise of the evaluators but the views of the claimant's witnesses on the correct scores will not be of assistance.

Second, moderation is just that. It is a process by which the initial views and draft scores of evaluators are then considered in often lengthy discussion with other SMEs. Those views are moderated and a consensus is reached. What generally matters is the consensus rationale and scores and the record of those, not the initial views or draft scores of the evaluators.

Third, the principle of proportionality imposes sensible limits on the procedural burdens imposed, and lengths to which contracting authorities must go, in recording its evaluation process. Comprehensive reasons were provided to Bechtel (a 104 page standstill letter) setting out the rationale for its scores and those of BBVS. No contracting authority is required to take verbatim notes of evaluation or moderation sessions. Isolated lapses (such as the failure to minute a meeting) may breach the transparency principle but do not assist the claim if they have no effect on the tender outcome.

Fourth, there is some flexibility under the UCRs to negotiate, clarify and finalise terms at preferred bidder stage and more so than under the Public Contracts Regulations 2015. However, it is certainly helpful to ensure that the tender documents provide for foreseeable post tender steps, such as clarifications and negotiations, as HS2's ITT did.

Fifth, if an authority sets an 'anomaly threshold' (here a 'fee collar') in its tender documents it will be difficult to argue that a bid which exceeds that threshold is abnormally low. Clearly, if the claim is that the threshold is irrational, the claimant has to challenge the tender documents within the relevant limitation period.

Finally, a claimant who caveats its bid with a commercially unacceptable qualification may struggle to convince a court that its alleged breaches have caused any loss.

Sarah Hannaford QC, Simon Taylor and Ben Graff acted for HS2, instructed by Addleshaw Goddard LLP.

This article was originally published by Practical Law in March 2021.

# THE INTERPRETATION OF CONTRACTS UNDER UAE LAW

By Richard Harding QC



**This article sets out the main principles of contractual interpretation under UAE law[1]. The differences from the common law are often under-estimated by foreign lawyers working in the region. The main points to note are that interpretation under UAE law is subjective, it is based on the parties' actual mutual intention; and although the contract terms are the primary indication of that mutual intention, other evidence is admissible, even if the terms of the contract are apparently clear.**

1 Most of the translations in this article are by the author. The rest are by James Whelan.



I address here 10 main principles.

## (1) UAE Law on Interpretation Is Not Only Based on Egyptian Law.

The civil code of the United Arab Emirates ("the Civil Code") is based on both Sanhouri's Egyptian civil code[2] and the Ottoman[3] Majalla. Sanhouri's civil code was based on the French civil code and concepts of Islamic law; and the Majalla was a codification of the principles of the Hanafi school[4] of Islamic law.

Sanhouri's extensive commentary on his own Egyptian civil code, Al-Wasit, is the most authoritative work used to explain the Gulf civil codes. However considerable care must be taken when relying on Sanhouri's writings in relation to UAE law, as the relevant articles may be based on, or influenced by, the Majalla, and therefore have a different meaning and effect from similar provisions of the French-influenced Egyptian civil code.

## (2) Interpretation Under UAE Law Is Subjective.

The official Commentary on the Civil Code says that *"interpretation of a contract means deducing the mutual intention of the contracting parties."*[5] This is the same basic objective as French law[6]. It is a subjective approach. Although English common law frequently refers to 'the intentions of the parties', interpretation is in fact objective, asking what a reasonable person would have understood by the words used by the parties.[7]

In the English case of *Chartbrook v Persimmon*[8], Lord Hoffman explained the difference between these objective and subjective approaches:

> ...French law regards the intentions of the parties as a pure question of subjective fact... uninfluenced by any rules of law. It follows that any evidence of what they said or did... may be relevant to establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect. English law, on the other hand, mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be.

## (3) UAE Law Is Based on the Parties' Mutual Intention.

Although UAE law requires the identification of the subjective intention, it is the intention of both parties together that matters, not each one separately. If the parties did not have a common intention regarding their obligations, there would usually be no agreement, and no contract to interpret.

Article 258(1) of the Civil Code[9] states:

> **العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني.**
>
> What matters in contracts is intentions and meanings and not words and forms.

The Commentary says in relation to this article:

> The meaning is that the intention of the contract is not to be found in the mere words used by the contracting parties, but rather in their true intentions in speaking the words that they spoke at the time of the contract, because the true intention is the meaning and not the words or the form used. Words are mere moulds for meanings...[10]

Both the Commentary and Sanhouri distinguish between apparent[11] intentions and inner intentions. The apparent intention is what is manifested by the parties, particularly by the terms of their contract, whereas the inner[12] intention is the parties' real intention. The Commentary and Sanhouri attribute different importance to these two types of intention.

Sanhouri, explaining the Egyptian Civil Code, said the following:

- *"The objective factors which represent the apparent intention, are the source from which the inner intention is deduced."*[13] In other words, the apparent intention is evidence of the inner intention.

- *"When interpreting clear conditions, the court of cassation does not allow the first instance court to depart from their clear meaning."*[14] *"But it is not to be understood from this, that a clear expression cannot be interpreted. The judge may find that he needs to interpret such an expression, no matter how clear it is, as clarity of expression is not clarity of intention. The expression itself may be clear, but the circumstances indicate that the contracting parties were wrong to use this clear expression. They intended a meaning, but expressed it with words which were not right, as these words clearly had a different meaning. In these circumstances, the judge does not take the clear meaning of the words, and must deviate from this to the meaning that the parties intended. In this way he interprets the clear words, and deviates from their apparent meaning, but without distorting their meaning in any way."*[15] This part of Sanhouri's explanation is often overlooked. It is commonly thought that where a term of a contract is clear, it is not open to any interpretation. However the correct position is that the judge can deviate from the meaning of the words, and interpret them in light of all the circumstances, provided that he/she does not simply distort their meaning.

However, the position under UAE law, as explained by the Commentary, is much less clear, and may be different from Egyptian law. This is what the Commentary says in relation to Article 266:

- *"In Islamic jurisprudence, what matters in the interpretation of a contract is the apparent intention rather than the inner intention."* This is an unhelpful generalisation. Sunni Islamic law consists of four orthodox "schools", with generally equal status[16]. Two of the schools, namely the Hanafi and Shafi'i, focus on expressed intentions, whereas the other two, the Hanbali and Maliki, focus on the parties' true

2 'Abd Al Razzak Al Sanhouri (1895-1971) was the author of the new Egyptian Civil Code, issued in 1948.
3 The Ottoman Empire (1299–1923) was centred in modern Turkey, and extended across most of the Middle East and into eastern Europe.
4 One of the 4 "schools" or divisions of orthodox Sunni Islamic law.
5 Commentary on Article 266
6 Pre-2016 French Civil Code, Art.1156
7 See, for example, *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 W.L.R. 3251
8 [2009] A.C. 1101
9 Which reproduces Article 3 of the Majalla.
10 Whelan's translation
11 **ظاهر** *dhahir*, which means apparent, manifest, evident
12 **باطن** *batin*, which means hidden, inner, secret
13 Al-Wasit, Vol.1, §386. All quotations from Sanhouri in this article are from this volume.
14 §390
15 §391

*"Although UAE law requires the identification of the subjective intention, it is the intention of both parties together that matters, not each one separately."*

intentions. The classic example is a sale of grapes. To the Hanbalis this would be unlawful if the parties intended that wine would be made from them, whereas such an agreement would be lawful to the Hanafis, without considering the intended use of the grapes.

- *"Inner intentions have no status, as they are personal phenomena that do not concern other people. It is the apparent intention that is relied upon by the contracting parties in their dealings with others. This is a social rather than a personal phenomenon, and it out of this that the contract is made."*[17] This is consistent with the Majalla, but seems to be dismissive of the relevance of the parties' true mutual intention.

From these parts of the Commentary, it appears that UAE law places a greater emphasis on the expressed intentions of the parties, than Sanhouri and Egyptian law do. However, as set out below, these differences may not be as great as they seem.

## (4) The Contract Terms Indicate the Mutual Intention.

The interpretation of contracts under UAE law is primarily based on the intentions and meanings which are to be derived from the words which the parties agreed to use in their contract. The Commentary on Article 266 says: *"The intention of the parties is to be deduced from the indication given by the words used in the contract."*[18]

## (5) Other Evidence of the Mutual Intention Is Admissible.

Under the common law, when *"construing any written agreement the court is entitled to look at evidence of the objective factual background known to the parties or reasonably available to them at or before the date of the contract… However, this does not entitle the court to look at evidence of the parties' subjective intentions…"*[19] The principal reason for this approach is that the exercise of interpretation is objective, considering how a reasonable person would have understood the words used.

The Commentary appears to say that UAE law requires the same focus on the words of the contract, to the exclusion of evidence of the parties' intention. But this would contradict Article 258(1). The Commentary directly addresses this apparent inconsistency, in its explanation of Article 266. Having said that *"it is the expression to which regard is had, and from which alone the intention is deduced"*, the Commentary continues…

> This is not lessened by the rule that matters are considered according to intentions, or that "what matters in contracts are intentions and meanings, and not words and forms"… These rules do not mean that regard is had to the inner intention. Rather, the aim is to have regard to the intentions and meanings which are to be derived from the expressions and text which are used, or from objective evidence or material indications. This does not go beyond an objective search, to a subjective search to try to discern what is in people's minds, or to discover the errors in their souls.

The Commentary makes clear in this last sentence that the aim of the law is not to try to work out what were the contracting parties' personal intentions. However the contract is to be interpreted not only by reference to the words of the contract, but also, importantly, from an *"objective search"* of *"objective evidence"* and *"material indications"*. The apparent discrepancy between Articles 266 and 258(1) is resolved by the admission of evidence other than the terms of the contract, provided that it is "objective", and it is not directed to what the parties each subjectively intended.

## (6) Evidence of Pre- and Post-Contracting Events Is Admissible.

Under the common law, evidence is generally not admissible as an aid to the interpretation of the terms of a contract,[20] if it relates to pre-contractual negotiations[21], or actions taken after concluding the contract[22].

However there is no such prohibition under the civil law[23], or the law of the UAE. Any relevant evidence of the parties' mutual intentions may be considered. But evidence of the parties' separate and subjective intentions will not be relevant. However it will often be the case that evidence of words used, or actions taken, before or after the contract was concluded, will be of little practical relevance to the interpretation of the words which the parties actually agreed.

## (7) External Factors May Aid Interpretation.

One of the most widely quoted, but misunderstood provisions of the Civil Code is Article 265(1), which says:

> **إذا كانت عبارة العقد واضحة فلا يجوز الانحراف عنها عن طريق تفسيرها للتعرف على إرادة المتعاقدين.**
>
> If the words of a contract are clear, the will of the parties may not be ascertained by an interpretation which deviates from them.

This article is phrased in the negative. It simply prohibits the judge or arbitrator from deciding that the will of the parties was something different from that indicated by the terms of the contract, by interpreting those terms (alone) to mean something other than their clear meaning. But this does little more than state the obvious. The judge cannot deliberately misread the terms of the contract to give them a meaning of his choosing.

However this article does not prohibit reference to evidence of the parties' mutual intentions from outside the contract. In light of such evidence, the mutual intention of the parties may not be clearly represented by those terms.[24]

Article 265(2) then says:

> **أما إذا كان هناك محل لتفسير العقد فيجب البحث عن النية المشتركة للمتعاقدين دون الوقوف عند المعنى الحرفي للألفاظ مع الاستهداء في ذلك بطبيعة التعامل وبما ينبغي أن يتوافر من أمانة وثقة بين المتعاقدين وفقا للعرف الجاري في المعاملات**
>
> However if there is a reason for interpreting the contract, then it is necessary to look for the common intention of the contracting parties, without stopping at the literal meaning of the terms, being guided by the nature of the transaction and the trust and confidence which should exist between the contracting parties in accordance with current business practice.

This article does not simply relate to the position where the terms of the contract are not clear. Its words do not mirror Article 265(1). Instead, it says that it applies *"if there is a reason for interpreting the contract"*. That reason may be a lack of clarity in its terms, or it may be a conflict between the terms and other evidence of the parties' mutual intention. In such cases, Article 265(2) provides that the judge or arbitrator is not limited to the literal meaning of the words used, and he/she can take into account three additional factors[25]: (1) the nature of the transaction; (2) the trust and confidence which should exist between the contracting parties; (3) current business practices.

## (8) "Doubt" Is Resolved in Favour of the Person Performing the Obligation.

Article 266(1) of the Civil Code says:

> **يفسر الشك في مصلحة المدين.**
>
> Doubt is to be resolved in favour of the person who is to perform the obligation.

Accordingly, the person who benefits from this article will depend on the nature of the applicable obligation.

The Commentary says: *"That which is certain is not removed by a doubt. Thus, if there is a doubt as to the indebtedness of a debtor, the certainty that he is innocent of the debt will not be overcome by a doubt about it."*[26] From this, it is apparent that Article 266(1) is not really a rule of interpretation at all. Rather, it simply reflects the basic burden of proof, and presumption of non-liability, unless liability is proved.

But this rule can be applied in the context of construction contracts, where certain matters have not been agreed. Sanhouri gives this example[27]: *"If a person is required to construct certain roads without it being determined how these roads should be constructed, or who should maintain them, then that person may perform his obligations in the way that is easiest for him, to lighten his burden."*

16 These schools, or divisions, are known as madhhabs (**مذاهب**) and are dominant in different geographical areas.
17 Whelan's translation, slightly amended.
18 Whelan
19 Lewison, The Interpretation of Contracts, 6th ed., Chapter 3, Section 17
20 Lewison, Chapter 3, Section 9
21 e.g. *Prenn v Simmonds* [1971] 1 W.L.R. 1381
22 e.g. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583
23 See Lord Hoffman in *Chartbrook*, above.
24 It is for this reason that the civil law does not include a concept equivalent to rectification. It is not needed.
25 The Commentary has little to say on these factors.
26 Whelan
27 §400

### (9) The Rules of Construction Are Limited.

Unlike the common law, which has numerous rules as to how a contract is to be construed, the civil law and the law of the UAE rely to a greater extent on the judgement of the trial judge (or arbitrator) to decide what was the mutual intention of the parties, as a matter of fact.[28]

However Sahouri refers to various "internal factors" which may be relevant to the interpretation of contracts . The following are a couple of examples:

- *"Trust in business requires that a person does not profit from ambiguity in the wording of a contract. Honesty in business requires a contracting party not to take advantage of ambiguous wording as long as he was able to understand its true meaning, or could have understood it."* Any ambiguity is therefore to be construed in a way which assumes that both parties were honest businessmen/women. This is the presumed intention of the parties.
- *"The words of the contract explain each other. No expression can be interpreted separately from the other expressions, but must be interpreted as part of the contract. A general expression may be limited by a preceding or following expression, and an expression may be an exception to something which is mentioned before or after it…"* A party cannot rely on a single term of a contract, where other terms modify its meaning.

### (10) The Law Adds Obligations to Contracts.

Not all of the obligations owed by one contracting party to the other, are expressed in the contract. Certain further obligations are added by the law.

For example, Article 264 of the Civil Code states:

**المعروف بين التجار كالمشروط بينهم**

That which is generally accepted between businessmen has the same effect as contractual terms agreed between them.

The effect of this article is to add, as an obligation, anything which is recognized by those in the relevant trade or industry as being an obligation. The example given in the Commentary is this: *"…where a person gives a thing to another for his use without discussing the cost of hire. The person making use of it must pay a fair amount for it."*[30] This article may therefore be the basis for an obligation to pay a fair or reasonable sum for work in respect of which no price has been agreed.

Article 246(2) adds obligations to those which are set out in the contract. It says:

**ولا يقتصر العقد على إلزام المتعاقد بما ورد فيه ولكن يتناول ايضا ما هو من مستلزماته وفقا للقانون والعرف و طبيعة التصرف.**

A contract is not limited to requiring the contracting party to do what it says, but also includes the necessary requirements for the contract, in accordance with the law, custom and the nature of the transaction.

This article adds obligations which are a necessary part of the contract. As a result, they are broadly equivalent to what the common law refers to as "implied terms"[31]. Accordingly, under UAE law, construction contracts may include obligations to co-operate, and not to prevent completion. Such terms may therefore form the basis for contractors' claims for the costs of disruption or prolongation[32].

> *"Unlike the common law, which has numerous rules as to how a contract is to be construed, the civil law and the law of the UAE rely to a greater extent on the judgement of the trial judge (or arbitrator) to decide what was the mutual intention of the parties, as a matter of fact."*

### Summary[33]

This article has addressed the following essential principles of contract interpretation under UAE law:

- UAE law on interpretation is not only based on Egyptian law.
- Interpretation under UAE law is subjective.
- UAE law is based on the parties' mutual intention.
- The contract terms are the primary indication of the mutual intention.
- Other evidence of the mutual intention is admissible.
- Evidence of pre- and post-contracting events is admissible.
- External factors may aid interpretation.
- Doubt is resolved in favour of the person performing the obligation.
- The rules of construction are limited.
- The law adds obligations to contracts.

28 As a result, there are few judgments of the Gulf courts addressing the principles of contractual interpretation. See Construction Law in the United Arab Emirates and the Gulf, Michael Grose, p.37.

29 §396

30 Whelan

31 See, for example, Keating on Construction Contracts, 10th ed., §3-055 to §3-087

32 See the author's paper/slides on the SCL(Gulf) website: Delay and Disruption Claims - The Law in the Gulf, 30 May 2012

33 A more detailed version of this article is available on request from Keating Chambers.



# INTERVIEW WITH SAMUEL TOWNEND QC

**Samuel Townend QC joined Keating in 2000. To mark him becoming a QC on 15 March 2021 we asked him some questions about his practice and route to silk. Sam is principally a High Court and international arbitration practitioner specialising in construction, professional negligence and energy fields. He has particular experience in working for NHBC, having been standing counsel for them for the past 12 or so years. He has also developed a specialism in offshore civils works, in particular work for and against international dredging contractors. He is called to the Northern Ireland Bar and, as in England and Wales, he is frequently pitted against Leading Counsel on construction and commercial cases.**

- **Are you from a legal background?**

No. It really is not something in my background at all. My mother was a stained-glass painter, my father (who will be coming to the ceremonial swearing in, whenever that might be) deals in architectural salvage. Grandparents included a gas engineer, shorthand writer and insurance clerk. I went to state schools and studied history at university. I originally thought that my future might lie in the civil service and, in particular, the FCO. Having passed the fast-track exams, I failed to obtain an offer which, I suspect, was down to my rather naïve performance in interview: channelling my inner 007. Following that failed attempt I then worked on demolition sites for about six months before committing to the Bar.

What my haphazard start did, however, allow me, was the ability to project a bit of experience of construction (writ widely) at my interview at Keating. Back in 1999 I managed to hoodwink Philip Boulding, Richard Harding and Simon Hargreaves (only the first of whom was then in Silk) into persuading Chambers to give me an offer of pupillage, which I accepted, and the rest is history.

- **You were described by one client as "a first-class advocate with the tenacity of a pitbull and manners of an English gentleman" – what other qualities do you think are important for a modern barrister?**

Ha, I still have not found out who said that about me- they deserve the prize for creative eloquence rather than me!

The demands of practice now require a host of qualities that the barrister two generations ago would simply not have understood, let alone accepted. On the whole they are qualities outside the court room, the discipline of court room advocacy has, I suspect, stayed substantially the same.

The first is the need for flexibility and joint working with solicitors and client. Instructions now come in so many different forms. There is frequently a need for immediate or very quick responses. You often work together from the start to define the 'job scope', prepare a joint 'beauty parade' or bid with solicitors for the biggest cases and, invariably, at the outset providing costs estimates often all the way to trial. I think we have always been flexible as to times of working, but with the advent of remote conferences with clients from across the globe, that is now to a degree greater than it was before.

Soft skills of cooperation, management of teams, attention to individuals are now essential aspects to practice. Gone are the days when a barrister could simply sagely hand down advice from on high. Getting on with professional and lay clients, building up their trust in you, is as critical to obtaining repeat instructions as being right and effective in court. In some senses this is a natural extension of an old skill that barristers have (or ought to have) being the tailoring of presentation to what is most persuasive to the Judge or tribunal but extending that to clients too. The ability to use technology is also increasingly a given!

*"Getting on with professional and lay clients, building up their trust in you, is as critical to obtaining repeat instructions as being right and effective in court."*



- **You are standing counsel for NHBC who you appeared successfully for in the Court of Appeal in the Herons Court case in 2019. What was the key finding in that important case on the duties of Approved Inspectors?**

On that appeal (together with Harry Smith) I acted for the building control arm of NHBC, who had been pursued under the Defective Premises Act 1972 by owners of flats in Herons Court for alleged breach of the common duty of care found in s. 1. Following a successful strike out application before Waksman J. on the grounds that no such duty was owed by Approved Inspectors (privatised building control), the owners sought and obtained permission to appeal on the grounds of public importance and novelty. I was pleased that the Court of Appeal unanimously dismissed the appeal on the two main grounds I relied upon in submissions. First, on the natural wording of the 1972 Act building control/Approved Inspectors are not carrying out work relating to the "provision of a dwelling". They 'police' the build, but do not positively contribute to the provision or creation of the dwelling. Secondly, the speeches of the House of Lords in Murphy v Brentwood DC are highly persuasive and strongly suggest that a local authority inspector owes no such duty and no distinction can properly be drawn between the position of public building control and private Approved Inspectors.

- **You have also been an elected local councillor, how did that work with practice at the Bar?**

In all honesty it is difficult, though just about possible, to combine the two. From 2006 I was a councillor in the London Borough of Lambeth in which I was able to do some good for my constituents and, in fact, I have stood for Parliament twice: In Reigate in 2005 and in Bristol North West in 2010; in neither case did I win. I was selected for Bristol by the local Labour Party in June 2007, just a day before Gordon Brown became the Prime Minister, the Conservatives and Liberal Democrats already having picked their candidates. Little did I (or my opposite numbers) expect at that point that we would be fighting a phoney war for three years before the short campaign (after a general election is actually called). What many may not know is that all the political parties demand immense time and commitment from their candidates from selection (roughly 3- 4 days every week) unpaid (of course), but also with very little supporting resource. I had a part-time campaigner assisting me for about the final year only. The rest is you and volunteers. It was exciting at times, but it exacted a heavy personal toll on my family life and an effective hiatus in my career at the Bar (until 2010). I have not been persuaded to stand again- even if anyone would want me!

- **How does taking silk differ during COVID?**

To become a QC is the culmination of many years of work and even COVID hasn't been able to remove that sense of achievement.

I found out about the appointment a day earlier than anticipated when an email was pinged through from the QCA (QC Appointments) on a Wednesday evening a week before Christmas. Of course, it being lock down there has been no going out to celebrate. Earlier this year I received the loyal declaration by email, normally spoken before the Lord Chancellor in full regalia in Westminster Hall, and asked to print out, sign, scan and send back- not quite the same! This is so I can use the designation of QC from 15 March. Fortunately, there has been no requirement for a Zoom swearing in ceremony although Keating will mark the day with a virtual celebration. The indications are that there will be a ceremony at some point in the future and, of course, hopefully I can soon celebrate in person with colleagues, family and friends. I am grateful to all those who have supported my journey to silk both professionally and personally. Although an individual accolade, it is not something that can be achieved without the strong support of others.

### What sort of disputes are you currently working on?

- Cross-examining in an ICC Arbitration evidential hearing where the subject-matter is engineering services in relation to a substantial infrastructure project in the Middle East.
- Attending applications and first costs and case management conference in the TCC in relation to a four-party high-end defective residential property dispute.
- Determining a dispute concerning an energy from waste project appointed as Expert under the turn-key ADR clause.
- Acting for the solicitor defendant in a mediation of a solicitors negligence dispute in relation to the conduct of litigation in the Isle of Man of a claim of negligence against an architect.
- Advising (with Adrian Williamson QC) an NHS Trust in relation to an ongoing appeal against a rejection of a proof of debt in the liquidation of a Project Co. following the termination of a PFI contract in relation to the construction and maintenance of a hospital. This has been transferred from the Insolvency court to the TCC and is, I believe, the first case of its kind and a substantial one at that- one side says £120M should pass one way, the other party claims payment of £80M.

By Abdul Jinadu

# THE GUTTING OF SECTION 106 OF THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996 PART 2.

**This is the second part of a two-part article considering the unfortunate approach which the courts have adopted to the interpretation and application of the residential occupier exemption contained in section 106 of the of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). The first part considered the overly restrictive interpretation placed on the term "residential occupier" and it demonstrated that the approach adopted by the courts was contrary to parliament's intention in enacting the residential occupier exemption as part of Section 106.**

This second article will consider the difficulties which are caused by the interpretation placed on the requirement that the relevant construction operations must be to a dwelling which one of the parties to the contract occupies or intends to occupy.

Section 106 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."*

Section 106 defines a dwelling by reference to the intention of one of the parties to a contract viz. a building constitutes a dwelling if one of the parties to the contract intends to occupy the dwelling as a residence. It expressly excludes from the definition of a dwelling house a building containing a flat but adds a definition for a flat viz. a 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 which falls within the definition of a dwelling.

What was eventually to be Section 106 was considered on the second reading of the Act and in debate in committee. The legislative purpose of the section was clearly elucidated on behalf of the government in the House:

(i) Hansard 28 March 1996 Volume 570 Column 1872 in committee in the House of Lords:

Earl Ferrers speaking for the government:

*"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."*

(ii) Hansard 22 April 1996 Volume 571 Column 949 on second reading in the House of Lords:

Lord Lucas speaking on behalf of the government:

*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.*

(iii) Hansard 23 July 1996Volume 574 Column 1336 on a third reading in the House:

Earl Ferrers speaking for the government:

*"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." (Emphasis added)*

Parliament's intention was clear. It intended the residential occupier exemption to apply to any residence, including second homes or holiday cottages, which one party to the contract intended to occupy.

In more general terms, as the court accepted in *St Peter Total Building Solutions Ltd v Michelle Rhodes* [2020] EWHC 2036 (TCC) *"the overall intention of section 106 appears to be to concentrate adjudication upon commercial disputes and to leave out of account, as it were, disputes which relate to ordinary members of the public"* [1].

In this context difficulties have arisen regarding the application of Section 106 in three scenarios:

(i) The construction works comprised works to areas or buildings which one of the parties intended to occupy and part which it intended to sell or rent out.

(ii) The construction works comprised works to areas or buildings which one of the parties to the contract intended to occupy and part which it intended for occupation by third parties such as family members and guests on a non-commercial basis.

(iii) The construction works were to a single building which had been sub-divided into separate living areas partially horizontally and partially vertically with the separate living areas to be occupied by members of the same family on a non-commercial basis.

Each of these scenarios is illustrated by a decision of the TCC. The first scenario is probably the easiest to resolve and is represented by the decision in *Samuel Thomas Construction v J. & B. Developments*, unreported, January 28, 2000. In that case the contract related to the conversion of two barns, one for residential occupation by the defendants and the other for sale by them, as well as the conversion of a garage block. Disputes arose between the claimant and the defendants, as a result of which the claimant's invoices went unpaid. The claimant referred the dispute to adjudication, and was awarded £48,826.84. The defendants contended that the claimant was not entitled to refer the dispute to adjudication, since the contract between them was not a construction contract for the purposes of the Act, because it was a construction contract with a residential occupier which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

1 Paragraph 9 of the judgment.

HHJ Overend sitting in the TCC in Exeter found on the facts that although the works related to both barns, the works principally related to the barn and associated garage block which were to be sold, therefore the contract did not fall within the residential occupier exemption and was therefore not excluded from the application of the Act. It is submitted that on the facts this case was correctly decided albeit that the outcome was arguably harsh on the defendants. In hindsight the defendants would have been best advised to have split the works into two contracts; one contract for their residence and another for the works related to the parts which they intended to sell.

The second scenario is represented by the decision in *Shaw v Massey Foundation and Pilings Ltd* [2009] EWHC 493 (TCC). In *Shaw v Massey* the applicants (the Shaws) had engaged the Respondent (Massey) to carry out building works at a cottage separate to the main house and which was some distance away from the main house where they resided. The contract did not contain a provision for the reference of disputes to adjudication and following disputes arising between the parties Massey commenced adjudication proceedings and was successful. It was successful in the County Court in enforcing the decision and the Shaws brought an appeal to the TCC arguing inter alia, that the adjudicator lacked jurisdiction because they were residential occupiers within the meaning of the Act.

In finding against the Shaws the court expressly recognised that there was no commercial element to the contract (and it distinguished the decision in *Samuel Thomas Construction* on this basis). However the court found that the cottage constituted a separate building and as there was no indication that the Shaws intended to occupy the cottage themselves, they did not qualify as residential occupiers.

In finding against the Shaws the court dismissed the definition of dwelling in Section 101 of the Act which provides that:

*"101. Minor definitions: Part I In this Part- 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it"*

The court held that the definition in Section 101 was irrelevant because (a) it only applied to Part I of the Act and had no application to adjudication and (b) Section 106 contained its own definition of dwelling.

> ***"This is a point of potential public importance because the creation of multigenerational homes is common and increasingly so due to economic factors and demographic change and such dwellings are particularly common in BAME communities."***

It is submitted that the decision in *Shaw v Massey* applied an overly restrictive interpretation to the definition of residential occupier based on the distance of the property, which was the subject of the works, from the main dwelling and that the decision ignored parliament's intention in passing the section 106 residential occupier exemption. The difficulties arising from the decision in *Shaw v Massey* can be demonstrated by a small adjustment to the facts. If, for example, the cottage had in fact been a garage which was connected to the main building, but which was its own substantial structure, and the intention had been to convert the garage into a "granny flat" or self-contained living quarters for one of the Shaw's children. Based on the reasoning in *Shaw v Massey*, arguably the Shaws would have qualified as residential occupiers because of the proximity of the building to the main dwelling. If it is maintained that because the Shaws themselves did not intend to occupy the converted premises then they still would not have qualified as residential occupiers, then it is submitted that this ignores the principal purpose of the Section 106 exemption as is clarified by the debate in parliament. The intention was to exempt from the application of the Act contracts which did not have a commercial purpose and if it intended to give effect to parliament's intention, the court should have placed emphasis on this factor.

This is a point of potential public importance because the creation of multigenerational homes is common and increasingly so due to economic factors and demographic change and such dwellings are particularly common in BAME communities. It is submitted that parliament's choice in applying the exemption principally not solely to operations on a dwelling which one of the parties occupies, or intends to occupy, makes allowance for multigenerational dwellings. This is consistent with the intent of the Act as recognised by the court *Shaw v Massey* which is to exclude disputes which relate to ordinary members of the public and contracts which contain no commercial element.

The third scenario is illustrated by the facts in *St Peter Total Building Solutions Ltd v Michelle Rhodes*. In that case the claimant had been contracted to carry out building works on the defendant's property. The purpose of the works was to convert one large dwelling into a building housing three separate living areas for the defendant, her mother and her daughter. Disputes arose between the parties to the contract which the claimant referred to adjudication. In seeking to set aside default judgment which had been entered by the claimant, the defendant argued that, as she was a residential occupier within the meaning of Section 106, the adjudicator lacked jurisdiction and there was no basis on which to enter judgment.

The issue of whether the defendant was a residential occupier led to debate as to the nature of the works which she had commissioned. The claimant contended that the works did not fall within the definition of works to a dwelling or a flat because the works were intended to create three flats. The defendant disputed this. She contended that the works commissioned were to create three living areas for the three individuals who it was intended would live in the property, and that the works qualified as works to a single dwelling because:

(i) the living areas were not separate and self-contained premises because all three areas were freely accessible from each other and shared common services such as a single boiler, single megaflow tank and heating system, a single laundry room, supply and fit of internal doors only to all areas;

(ii) the living areas were not divided horizontally as the defendant's living area occupied the whole of the first floor and the rear of the ground floor;

(iii) planning permission was applied and granted for renovation to a single dwelling only as per approved planning application drawings;

The defendant contended in the alternative that if the separate living areas did constitute separate flats, the defendant would still qualify as a residential occupier because the contract with the claimant *"principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as [her] residence"*. The fact that other "flats" were created for a non-commercial purpose as part of the works did not deprive the defendant of the entitlement to rely on the exemption provided by Section 106.

Although the court acknowledged at paragraphs 9 and 10 of the judgment in respect of the definition of a dwelling house and flat in Section 106 that it *"seems to me that that section of the Act is capable of giving rise to some lively argument as to what is and is not intended to be comprehended within the exception"* and that the *"present case illustrates a potential difficulty in that the defendant's contention by reference to various plans which I have been shown is that this house was intended to be converted into a number of flats which were to be occupied by the defendant and members of her family but ... not on a basis which meant that they were entirely self-contained. Exactly which side of the line that falls seems to me to be debatable..."* the court nevertheless found against the defendant without, it is submitted, grappling with this issue.

## Conclusion

As with the scenario discussed above in respect of the facts in *Shaw v Massey*, the application or disapplication of the residential occupier exemption based on the definition of a dwelling house and a flat have the potential to have broad implications for the general public. The increasing number of multigenerational homes makes it more likely that facts of the type which arose in *St Peter v Rhodes* will become increasingly common with the effect that many consumers entering into contracts will find themselves unwittingly subject to the draconian provisions of the Act, not just in respect of adjudication but also as regards payment provisions.

The somewhat inexplicable hostility of the courts to the Section 106 residential occupier exemption is unfortunate because it has and will likely increasingly result in consumers being subject to the provisions of the Act, which is not what parliament intended. Unfortunately, it appears that the only solution will be legislative as there seems to be little appetite to course correct in the courts.

# KEATING CASES

## A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

### ABC Electrification Ltd v Network Rail Infrastructure Ltd [2020] EWCA CIV 1645

A contractor appealed against a judge's interpretation of a contract made with Network Rail for works to upgrade the power supply to a railway line. The contract incorporated terms of the Civil Engineers Conditions of Contract, Target Cost Version, First Edition (the ICE conditions) and subject to standard amendments used by Network Rail, known as "Network Rail 12" (the NR 12 amendments). Under the contract, the contractor was entitled to payment based in part on the "total cost" which excluded "disallowed cost". The dispute was over the definition of Disallowed Cost and the meaning of default which stated: "any cost due to negligence or default on the part of the Contractor in his compliance with any of his obligations under the Contract and/or due to any negligence or default on the part of the Contractor's employees, agents, sub-contractors or suppliers in their compliance with any of their respective obligations under their contracts with the Contractor". The contractor had not completed the contract works in accordance with the contractual timetable, and Network Rail sought to deduct £13.43 million as disallowed costs.

The contractor argued that the word "default" connoted fault in the sense of blame or culpable behaviour on the part of the contractor in carrying out his obligations under the contract. Whereas Network rail argued that 'default' should be read as it means, or includes a failure to fulfil a legal requirement.

The Court of Appeal held that the word "default" in the contract meant a failure to fulfil a legal requirement. There was no basis for introducing any qualification such as to import a requirement for the breach of contract to carry an unspecified degree of personal blame or culpability (or conduct) on the part of the contractor. The judge explored the true interpretation of the clause which referred to "Disallowed Cost", in the light of four key factors:

- the meaning of the language used (the Court said it was clear and unambiguous).
- the clause in its contractual context, i.e., as against the background of the contract as a whole (the Court stated that there was no proper basis for concluding that the parties must have intended the word 'default' to carry a different meaning from its ordinary and natural meaning);
- the purpose of the contract (the Court stated that the fact that the contract was a target cost contract was irrelevant to its approach to interpretation); and
- commercial common sense (the Court rejected ABC's argument that, as a matter of commercial common sense and/or commercial reality, the word 'default' cannot have been intended to cover any failure by ABC to comply with its contractual obligations, no matter how small and insignificant).

Accordingly, the Court of Appeal dismissed the appeal.

**Marcus Taverner QC and William Webb represented the Appellant.**

**Piers Stansfield QC represented the Respondent.**

### Aqua Leisure International Ltd v Benchmark Leisure Ltd [2020] EWHC 3511 (TCC)

In this judgment, the High Court (TCC) held that a settlement compromising an adjudicator's decision which had been entered into "subject to contract" did not amount to an "agreement" for the purposes of s.108(3) of the Housing Grants, Construction and Regeneration Act 1996, with the result that the adjudicator's decision remained binding and could be enforced. HHJ Bird, sitting as a High Court Judge, found that the defendant's case that the parties had proceeded to waive the "subject to contract" proviso by going on to perform parts of the agreement had no prospect of success at trial. The court went on to sever the small portion of the sum awarded by adjudicator in respect of legal costs, applying *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd* [2017] EWHC 2159 (TCC).

**Harry Smith represented the Claimant.**

### Clin v Walter Lilly & Co. Ltd [2021] EWCA Civ 136

This was a dispute over the contractual allocation of risk and responsibility for critical delay to high-value building works at the appellant's luxury residential property in the Royal Borough of Kensington and Chelsea.

By a modified JCT contract, the appellant homeowner, Mr Clin, engaged the building contractor, Walter Lilly, to carry out building works. Those works involved the reconfiguration of what were once two adjacent terraced properties into one larger property. Under the building contract, Mr Clin was under an implied contractual obligation to use all due diligence to obtain in respect of the Works any permission, consent, approval or certificate required under, or in accordance with, the provisions of any statute or statutory instrument for the time being in force pertaining to town and country planning ([2018] EWCA Civ 490 at [37]). During the course of the building works, the local planning authority asserted that the works in question constituted or involved 'demolition' within the meaning of s. 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990, for which conservation area consent was required. In the face of that statement, Walter Lilly ceased works on site until conservation area consent was obtained by professionals engaged by the appellant homeowner.

At first instance, Waksman J held that the building works did constitute 'demolition' within the meaning of the Act; that conservation area consent was required; and that Mr Clin was contractually responsible for the critical delay to the works, being in breach of his implied contractual obligation to Walter Lilly. On appeal, the principal issue, raised by Mr Clin's primary ground of appeal, was whether – on the proper interpretation of s. 74 – the 'demolition' question was purely quantitative (as Walter Lilly argued), or rather required consideration of qualitative matters, including the effect of the building works on the character and appearance of the area in which the building was situated (as Mr Clin argued). Having regard to the wording and purpose of the Act, and guided by the House of Lords decision in Shimizu [1997] 1 WLR 168, the Court of Appeal held (with the lead judgment from Carr LJ) that the question of whether or not demolition of a building is involved is a question of fact and degree to be assessed on a quantitative basis ie by reference to the extent of the demolition. Qualitative matters, including questions relating to the impact of the building works on the character and appearance of the area, were only relevant when the local planning authority came to decide whether to grant conservation area consent.

On a secondary ground of appeal, the Court of Appeal refused to interfere with Waksman J's finding that the building works constituted demolition even on a purely quantitative analysis. On a tertiary ground of appeal, the Court of Appeal rejected Mr Clin's argument that Waksman J had failed to appreciate the significance of a certificate of lawful development for the amalgamation of the two adjacent properties, which Mr Clin had obtained prior to commencement of the building works. The appeal was dismissed.

**Vincent Moran QC and Tom Coulson represented the Appellant.**

**David Thomas QC and Matthew Finn represented the Respondent.**

### Bechtel Limited v High Speed Two (HS2) Limited [2021] EWHC 458 (TCC)

This claim arose out of the procurement run by HS2 for the construction partner contract for Old Oak Common Station (one of the two Southern Stations on the HS2 network), a project with a target cost of over £1bn. Bechtel, an unsuccessful bidder, challenged the outcome and process of the procurement, alleging that there were manifest errors in scoring, that there were inadequate records of the moderation and assessment process in breach of the transparency principle and that the winning bid should have been disqualified for being abnormally low due to a lack of resources. Bechtel further alleged that the winning bid and the contract entered into with the winning bidder had been unlawfully modified. The trial on liability and causation took place live in October 2020 before the 2nd Covid lockdown. 18 witness were called over a 3 week period.

The Judge commented on the nature of judicial oversight in procurement cases, which is exercised with restraint. Proceedings are not an appeal against the outcome of the decision and the Court will only interfere with evaluation if there is manifest error.

He rejected substantially all of Bechtel's arguments and its case failed completely.

The Judge held not only that HS2 made no manifest errors in the evaluation of bids, but also that it made no errors at all. He found that there was no duty of 'good administration' on HS2 and that the procedural burden on authorities is balanced and limited by the principle of proportionality. The moderation records did not for example need to be verbatim accounts. There was no basis for any finding that the bid was abnormally low. While the project was slightly different to that tendered for in terms of programme dates, this was entirely to be expected and permitted under the terms of the competition.

Fraser J also found that in the event that Bechtel had been ranked as the winning bidder, it would have been disqualified from the competition by HS2 for failing to remove a fundamental qualification from its bid which would have shifted the financial risk profile of the Contract substantially to the detriment of HS2. Its case therefore also failed on causation.

**Sarah Hannaford QC, Simon Taylor and Ben Graff represented the Defendant.**

### Yuanda Vic Pty Ltd v Facade Designs International [2021] VSCA 44

In most of Australia and in Singapore, where the "East Coast model" of the so-called security of payment legislation applies, construction adjudication is available only upstream, and it is limited to contractual claims, thereby leaving claims for quantum meruit, damages and the like outside the scheme of the legislation. In Victoria, there is a further restriction: various categories of contractual claims (including claims for interest, some claims in respect of variations and time-based claims) are prescribed as "excluded amounts", outside the scheme of what is recoverable.

The East Coast model has a somewhat Draconian version of default judgment. A claimant can serve a payment claim, and if the respondent does not provide a payment schedule, responding to that claim, within 10 business days, then the sum claimed becomes automatically payable. In New South Wales, the payment claim does not even need to identify itself as such. Unsurprisingly, administrative oversight frequently means that the respondent fails to serve a payment schedule in time.

In those all-too-common circumstances, a claimant then has two options. It can either commence an adjudication, which is something of a turkey shoot because the respondent is not to be heard on any reasons as to why the sum claimed is not truly due, or it can go directly to court and ask for judgment. In practice, claimants often choose to go to adjudication, because the process of going through adjudication and getting an adjudication determination registered as it were a court judgment is typically quicker than getting an appointment from the court for a hearing.

In Victoria, with its excluded amount regime, there is a provision that the court is not to give judgment under the "shortcut" route if the claimed amount includes an excluded amount. Claimed amount here is a defined term: it means the amount claimed in the payment claim that was served.

In *Yuanda v Façade*, the question arose: "If the amount claimed in the payment claim includes excluded amounts, can the court give judgment for a lesser sum, thereby excluding the excluded amounts?"

At first instance, the court said "Yes". Describing these as important issues, the Court of Appeal of Victoria reversed the first instance decision, finding that the provision means what it says. If the amount that was claimed in the payment claim includes any excluded amount, the shortcut route is not available at all. In this case, the claimant had admittedly included a claim for excluded amount (the claim to interest) in its payment claim and the consequence was that the whole of the claimant's claim was dismissed.

**Robert Fenwick Elliott represented the Applicant.**

### Abbotskerswell Parish Council v (1) Secretary of State for Housing, Communities and Local Government (2) Teignbridge District Council and (3) Anthony, Steven & Jull Rew [2021] EWHC 555 (Admin)

Statutory review challenge to the Secretary of State's decision to grant planning permission for a 1200 dwelling residential-led mixed use urban extension at Wolborough Barton, Newton Abbot, in Teignbridge District. The development is the largest allocation in the Teignbridge District Local Plan 2014.

Despite the allocation it was refused planning permission by Teignbridge District Council and proceeded to be considered at a 3 week planning inquiry appeal in 2019. Agreeing with the Inspector, the Secretary of State allowed the appeal and granted planning permission in June 2020.

The claimants challenged that decision under s.288 of the Town and Country Planning Act 1990. The grounds raised the following principal issues:

- Whether the environmental statement was deficient, and in breach of the Environmental Impact Assessment Regulations, due to the omission of a chapter dealing expressly with the impact of the development on greenhouse gas generation and climate change; and
- Whether reservation to the reserved matters stage of details, as to how the impact of development would avoid adverse impacts on the rare greater horseshoe bat population of the South Hams Special Area of Conservation, was consistent with the EIA Regulations and the Habitats Regulations.

In an important judgment, the High Court (Lang J.) determined both these issues in favour of the First and Third Defendants, who resisted the claim (the Second Defendant, Teignbridge Council, did not participate in the proceedings) and dismissed the claim. Permission to appeal was refused.

**Charles Banner QC represented the Third Defendants.**

# HALLIBURTON v CHUBB:

## A VALUABLE INSIGHT INTO THE APPROACH TO ARBITRATOR BIAS TAKEN BY DIFFERENT INDUSTRY SECTORS

**Paul Buckingham and James Thompson review the long awaited decision by the Supreme Court on the question of arbitrator bias or, more accurately, the appearance of bias.**



The recent decision of the Supreme Court in Halliburton Company v Chubb Bermuda Insurance[1] raises important issues concerned not just with the domestic arbitration practice but with the approach of English law to an arbitrator's obligations of disclosure from an international perspective.

The facts of the case are quite complex and the principles to be drawn from the decision require an understanding of the underlying procedural history.

### Factual Background

The proceedings concerned a dispute arising out of the explosion and fire on the Deepwater Horizon oil rig in the Gulf of Mexico in 2010. The disaster occurred when a well, which was in the process of being plugged and temporarily abandoned, suffered a blow out.

Transocean Holdings LLC ("Transocean") was the owner of the rig, which was leased to BP Exploration and Productions Inc ("BP"). Transocean had been engaged by BP to provide crew and drilling teams, while Halliburton provided cementing and well-monitoring services to BP in relation to the temporary abandonment of the well.

Both Transocean and Halliburton purchased liability insurance on the Bermuda Form from ACE Bermuda Insurance Ltd, now called Chubb Bermuda Insurance Ltd ("Chubb"). The Bermuda Form policy was created in the 1980s to provide high excess commercial general liability insurance to companies in the United States after the market for such insurance had collapsed. Such policies usually contain a clause providing for disputes to be resolved by ad hoc arbitration not subject to institutional rules. The policies purchased by Transocean and Halliburton were on materially similar terms including an arbitration clause.

The arbitration clause in the policy taken out by Halliburton provided for arbitration in London by a panel of three arbitrators, one appointed by each party and the third to be agreed by the two nominated arbitrators. In default of agreement, the appointment of the third was to be made by the High Court in London. Since the seat of the arbitration was London, English law governed the procedure (albeit the substantive law of the contract was New York law).

1 [2020] UKSC 48

A dispute arose between Halliburton and Chubb which Halliburton referred to arbitration ("Reference 1"). Halliburton and Chubb each appointed an arbitrator. However, the party-appointed arbitrators were not able to agree on the appointment of the chairman and there was therefore a contested High Court hearing in the summer of 2015 before Flaux J in which each party put forward several candidates. Flaux J appointed one of those put forward by Chubb, Mr Kenneth Rokison QC, an arbitrator with (as the Supreme Court subsequently noted) *"a long-established reputation for integrity and impartiality"*.

Prior to accepting the appointment, Mr Rokison disclosed that he had previously acted as arbitrator in several references in which Chubb was a party, including as Chubb's nominated arbitrator, and was currently appointed in two pending references involving Chubb. The High Court did not consider these to preclude Mr Rokison from being appointed in the present reference.

Thereafter, Mr Rokison was appointed in two further arbitrations as follows:

a. In December 2015, he accepted an appointment by Chubb in relation to a claim by Transocean also arising out of the Deepwater Horizon Incident ("Reference 2");

b. In August 2016, he accepted an appointment in a further arbitration arising out of the Deepwater Horizon Incident involving a claim by Transocean against a third party insurer ("Reference 3").

Before his appointment in Reference 2, Mr Rokison disclosed his appointment in Reference No. 1 and the other Chubb arbitrations to Transocean, who did not object. However, Mr Rokison did not disclose his proposed appointment in Reference 2 to Halliburton, nor was there disclosure of Mr Rokison's appointment in Reference 3 to Halliburton.

The overall position is set out in the table below:

| Reference | Appointing party | Claimant | Respondent | Disclosure? |
|---|---|---|---|---|
| 1 | Court (Chubb's proposed candidate) | Halliburton | Chubb | Previously acted as arbitrator in several arbitrations to which Chubb was a party, including as party-appointed arbitrator nominated by Chubb, and two pending references in which Chubb involved |
| 2 | Chubb | Transocean | Chubb | Disclosure of Reference 1 and others disclosed to Halliburton in Reference 1. |
| 3 | Joint | Transocean | 3rd party insurer | Did not disclose to Halliburton in Reference 1. |

When Halliburton discovered Mr Rokison's appointments in References 2 and 3, it wrote to him raising its concerns and asking for an explanation. Mr Rokison replied stating that, whilst he was under no obligation to disclose the appointments under the IBA guidelines referred to by Halliburton, it would have been prudent to do so and apologised, offering to resign. However, Chubb objected to Mr Rokison's resignation on the basis that it would cause delay and wasted costs.

Mr Rokison wrote again to the parties, making clear that he had not learned anything about the Deepwater Horizon Incident from the other two references that was not already public knowledge, but recognising the fundamental importance of the parties' confidence in the Tribunal and its chairman said that he would resign if the matter were left to him to decide. He invited the parties to agree a replacement chairman who would be available for the forthcoming hearing.

## Court Applications

Halliburton issued a claim form in the High Court seeking an order that Mr Rokison be removed as arbitrator pursuant to section 24(1)(a) of the Arbitration Act 1996 ("the 1996 Act").

Section 24(1)(a) of the 1996 Act provides as follows:

24 *Power of court to remove arbitrator.*

*(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—*

*(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;*

In the High Court, Halliburton's application was dismissed in early 2017. Popplewell J held that there were no justifiable concerns regarding Mr Rokison's acceptance of the appointments in References 2 and 3 and there was therefore nothing to be disclosed.

Later that year, the Tribunal issued their award on the merits in Reference 1 in Chubb's favour. However, Halliburton's nominated arbitrator, Professor Park, issued *"Separate Observations"* saying that he could not join in the award due to *"profound disquiet about the arbitration's fairness"*. As a result, the award was rendered as a majority award.

Halliburton then appealed the rejection of its Section 24 application to the Court of Appeal. Whilst the appeal was dismissed, the Court of Appeal said that it was good practice in international arbitration to disclose multiple appointments and, given the overlap between the references, that Mr Rokison was under a duty to disclose them to Halliburton.

However, in the Court of Appeal's view, the fact of multiple appointments did not of itself justify an inference of apparent bias. The fact that the failure was accidental rather than deliberate and the limited degree of overlap between the references meant that there was no real possibility of bias on the facts objectively judged.

Halliburton appealed to the Supreme Court.

Supreme Court decision

The hearing took place in November 2019 and the decision was handed down a year later, in November 2020.

The case is notable in that by the time the matter reached the Supreme Court there were five intervening parties, being:

a. The International Court of Arbitration of the International Chamber of Commerce (the "ICC");

b. The London Court of International Arbitration (the "LCIA");

c. The Chartered Institute of Arbitrators (the "CIArb");

d. The London Maritime Arbitrators Association (the "LMAA");

e. The Grain and Feed Trade Association (the "GAFTA").

Interveners are parties not connected with the dispute itself but official bodies who were given permission to make submissions in the public interest. In addition to written submissions from all interveners, the ICC and LCIA were permitted to make oral representations at the hearing.

The Supreme Court held as follows:

a. English law imposes a legal duty of disclosure on arbitrators, which derives from the statutory duty to act fairly and impartially in section 33 of the 1996 Act.

b. The duty of disclosure in English law requires the fact of multiple appointments involving the same or overlapping subject matter to be disclosed in the absence of contrary agreement between the parties. That includes circumstances such as the present case, in a field of arbitration in which multiple appointments occur but where there is no common understanding that disclosure is not required.

c. Mr Rokison should have disclosed the appointment in Reference 2 and his failure to do so was a breach of that duty.



*"The Supreme Court's decision draws into focus the diverse approaches within different industry sectors to arbitration and the approach to arbitration more globally."*

d. However, on the facts, and in particular Mr Rokison's explanation of the failure he gave to the parties by the date of the hearing to remove him, the objective test for bias was not satisfied. The fair-minded observer would not have concluded that there was a real possibility of bias, despite the fact of non-disclosure.

Those principles should be read in light of two specific points which underly the Supreme Court decision:

a. The case concerned an ad hoc arbitration with a London seat and no applicable institutional rules. Accordingly, the objective English law test for apparent bias applied. However, many institutional rules adopt a subjective test, such as the IBA Guidelines, ICC Rules and LCIA Rules which all focus on the perceptions of the parties themselves. This is a fundamental difference in approach that must be borne in mind when considering the possible application of the decision in other cases.

b. The issue in the case concerned the appointment of the same arbitrator in multiple references involving the same or overlapping subject matter. It is not a decision on the subject of repeat appointments in general. The potential problem at the heart of the case is the possibility that one party may obtain an advantage over the other by having access to information about the common arbitrator's responses to the evidence or arguments in the related arbitration. It is essentially a problem of equality of arms, rather than bias per se (and there is a legitimate question as to whether section 24(1)(a) of the 1996 Act in fact is intended to address this issue at all).

## Implications of the Decision

The Supreme Court's decision draws into focus the diverse approaches within different industry sectors to arbitration and the approach to arbitration more globally.

In terms of the industry sectors, construction lawyers would expect an arbitral tribunal to approach each dispute from an objective basis without any preconceptions about the issues. This is usually the case in any event because construction projects are invariably bespoke and the issues on each project are specific to their particular facts or the precise contractual terms negotiated by the parties. It is rare for different projects to be implemented on identical contractual terms or constructed to identical technical specifications. Internationally, the position is even more diverse with projects executed on a very wide variety of contractual terms, differing technical standards and subject to country specific rules and regulations. The scope for common or overlapping issues is often rare.

This is perhaps reflected in the fact that the ICC, LCIA and CIArb all expressed concerns that the Court of Appeal's decision was out of step with internationally accepted standards and practices:

a. The LCIA was concerned that the tests set out by the Court of Appeal were not sufficiently strict compared with international norms, arguing that the context of the arbitration was important and much depended upon the facts.

b. The ICC submitted that the fact of multiple overlapping appointments with only one or some common parties concerning the same or overlapping subject matter could, depending on the circumstances, give rise to reasonable doubts as to the arbitrator's impartiality.

c. The CIArb's view was that the acceptance by an arbitrator of multiple appointments in related references without full disclosure to all parties may, without more, give rise to justifiable doubts as to impartiality.

*"From a construction perspective, confirmation that the duty of disclosure in English law requires the fact of multiple appointments involving the same or overlapping subject matter to be disclosed, in the absence of contrary agreement between the parties, is to be welcomed."*

The approach of these three bodies can be contrasted with the position in maritime and commodities arbitrations, as explained by the interveners GAFTA and the LMAA, because it is an accepted feature of such arbitrations that arbitrators will act in multiple references without calling into question their fairness or impartiality:

a. GAFTA submitted that disputes often arise in chain or string supply contracts and that arbitrations in such contracts, which often involve common issues of law or fact, are regularly referred to the same arbitrator or arbitrators. Its rules do not require its arbitrators to disclose multiple appointments in relation to the same event or issue.

b. LMAA similarly explained that multiple appointments were relatively common under their procedures because they frequently arose out of the same incident. It said that speed and simplicity were necessary because of the tight limitation periods in maritime claims, and there is a relatively small pool of specialist arbitrators whom parties use repeatedly.

It is clear that there were legitimate views on both sides as to the impact of the decision on commercial arbitrations. From a construction perspective, confirmation that the duty of disclosure in English law requires the fact of multiple appointments involving the same or overlapping subject matter to be disclosed, in the absence of contrary agreement between the parties, is to be welcomed. The existence of a legal duty promotes transparency in arbitration and is consistent with the best practice inherent within many international institutional rules and guidelines.

Nonetheless, and whilst rare, there can be instances of overlapping subject matter in construction projects. For example, the deficiency in the DNV J101 design code, which was used extensively in the offshore windfarm industry over an extended period of time, is an example of a technical issue that affected the operational fitness for purpose of numerous offshore windfarms (see the Supreme Court decision of MT Højgaard v E.On[2]). The acknowledged error in the code meant that there was a common problem inherent in numerous windfarms. Full disclosure of an arbitrator's prior involvement in any such disputes would promote transparency and guard against any party seeking to gain an advantage through the repeated appointment of the same arbitrator with a known view on the issue.

However, there had been criticism of the lower courts' decisions on the basis that they did not give sufficient weight to international norms. Perhaps with these criticisms in mind, the Supreme Court recognised that the common law objective test should be applied with regard to "*the particular characteristics of international arbitration*" and noted that the fair-minded observer should have knowledge of the *"debate within the international community as to the precise role of the party-appointed arbitrator"*.

With those caveats in mind, and mindful of the ongoing debate within the international community and the divergent views between the different trade bodies and industry sectors, it is suggested that this decision might not be the last word on the matter.

2 [2017] UKSC 59



By Harry Smith

# AQUA LEISURE INTERNATIONAL LTD V BENCHMARK LEISURE LTD [2020] EWHC 3511 (TCC)

# A NEW BENCHMARK FOR WAIVER IN ADJUDICATION?

1. It is now unusual for any case to raise a truly novel point in the context of adjudication enforcement. *Aqua Leisure International Ltd v Benchmark Leisure Ltd* – a case about a waterpark in Scarborough – raises two.

## The Facts

2. Benchmark engaged Aqua in 2015 to design, supply and install water rides and attractions at the The Sands, North Bay, Scarborough. The contract provided for adjudication in accordance with the Scheme.

3. In June 2017 the parties fell into dispute over payment. An adjudicator was appointed and ordered Benchmark to pay £200,537.35 to Aqua within 7 days. This sum included an award of £12,600 by way of legal costs pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

4. Following the adjudicator's decision, the parties entered negotiations and, in late August/early September 2017, reached a compromise agreement intended to wrap up the parties' dealings under the contract – including the adjudicator's decision – by which Benchmark would make a series of payments to Aqua, Benchmark's parent company would provide a guarantee, and Aqua would carry out snagging works. This agreement was made expressly "subject to contract".

5. Over the following months, Benchmark made a number of payments to Aqua, and Aqua carried out snagging works. In December 2017, Aqua sent a deed of settlement to Benchmark for signature. Benchmark did not sign. Aqua sent the deed to Benchmark five times more. Still Benchmark did not sign. However, in the background, Benchmark's payments, and Aqua's snagging works, went on regardless.

6. Matters came to a head in May 2018 when it transpired that Benchmark was at risk of defaulting on the final payment due under the compromise. Aqua made clear that it wished to rely on the guarantee from Benchmark's parent company. Benchmark replied that its parent company would not be providing a guarantee.

7. Aqua commenced proceedings in the High Court (TCC) to enforce the adjudicator's decision. Benchmark resisted enforcement on the grounds that (a) in view of the compromise, the decision was no longer binding; and (b) the portion of the decision awarding Late Payment Act costs was unenforceable.

## The "Subject to Contract" Issue

8. Section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 provides:

> **"The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."**
>
> (Emphasis supplied)

9. In view of this provision, it was common ground between the parties that if the compromise agreement had become binding, the result would be that the parties were no longer bound by the adjudicator's decision.

10. In support of its case that the decision should be enforced, Aqua argued that the compromise had been entered into expressly "subject to contract" and had not lost that status later. It relied principally on the importance which Aqua had evidently placed on the signing of a written agreement, and on Benchmark's repeated refusal to sign.

11. Benchmark's case was that, whilst the compromise was initially "subject to contract", the parties had later agreed to treat the agreement as binding. It relied on the fact that Benchmark had made payments and Aqua carried out work pursuant to the compromise which – Benchmark argued – they would not have done had they not regarded themselves as legally bound.

*"This case is a paradigm example of why the court "will not lightly hold" that a condition that negotiations and agreements are "subject to contract" has been superseded."*

12. The law governing the use of the phrase "subject to contract" is well-settled. In *Generator Developments Ltd v Lidl UK GmbH* [2018] EWCA Civ 396, Lewison LJ said at [79]:

    **"... The meaning of that phrase is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) each party reserves the right to withdraw until such time as a binding contract is made. It follows, therefore, that in negotiating on that basis [both parties] took the commercial risk that one or other of them might back out of the proposed transaction ... In short a 'subject to contract' agreement is no agreement at all. ..."**

13. In *RTS Flexible Systems Ltd v Molkerei* [2010] UKSC 14, Lord Clarke said at [56]:

    **"Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the "subject to [written] contract" term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold."**

14. Applying these authorities, HHJ Bird held that Benchmark's case had no prospect of success at trial, stating:

    **"This case is a paradigm example of why the court "will not lightly hold" that a condition that negotiations and agreements are "subject to contract" has been superseded. The parties set their own rules of engagement. They agreed that there would be no binding contract until the terms were reduced to writing and signed off. They clearly envisaged that an agreement would be reached but that it would not be enforceable until the formalities had been observed. The presence of an agreement that was acted on, is not therefore without more enough to indicate that the parties intended to be bound. It was obvious that the agreement would be acted upon before it became binding."**

## Waiver

15. The court went on to consider the portion of the adjudicator's decision awarding Late Payment Act costs.

16. Following publication of the decision, *Enviroflow v Redhill* [2017] EWHC 2159 (TCC) had established that adjudicators do not have the power to award legal costs under the Act. Benchmark relied on this in support of its case that the portion of the decision awarding legal costs should be severed. It argued that the court could correct the error, applying *Caledonian v Mar* [2015] EWHC 1855 (TCC).

17. Aqua accepted that it followed from *Enviroflow v Redhill* that the adjudicator was wrong to make an award of legal costs. However, Aqua argued that this made no difference to the enforceability of the decision. Either the error was one of law – in which case the decision should be enforced regardless: see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] EWCA Civ 507; *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 – or it was an error of jurisdiction, in which case the point was not open to Benchmark absent a proper reservation of its position: see *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27 at [92].

18. Further, Aqua argued that *Caledonian v Mar* did not assist Benchmark in view of the more recent decision in *Hutton v Wilson* [2017] EWHC 527 (TCC), to the effect that the court would correct an error of law only in circumstances where the defendant had issued a Part 8 claim form seeking an appropriate declaration. Benchmark had not done so.

19. Thus, Aqua argued, the decision remained fully enforceable whichever analytical route one took.

20. However, in an original and interesting part of the judgment, HHJ Bird departed from both parties' submissions to some degree. He found that this was not a case where *Caledonian v Mar* applied. Rather, the question of Late Payment Act costs was a question **"of jurisdiction in the most fundamental sense"**. The adjudicator:

    **"had no jurisdiction to make the award at all because the statute under which he purported to act had no application."**

21. Further, and notwithstanding that Benchmark had not reserved its position, this was not a case where the defendant could be taken to have waived its jurisdictional objection, for two reasons. First, the defendant could not be expected to reserve its position on the basis of the reasoning in *Enviroflow* before *Enviroflow* had been decided:

    **"To conclude otherwise might well lead to parties to adjudication expressing general reservations in respect of developing law. That would be undesirable."**

22. Second, HHJ Bird indicated that he was **"not persuaded that a fundamental point of jurisdiction such as the one in play here is capable of being waived".** His reasons included that:

    (1) The absence of jurisdiction to award Late Payment Act costs **"does not arise out of a mere procedural failure (which could be waived) but rather out of an express statutory provision removing the right to rely on the 1998 Act".**

    (2) The parties could not override the effect of the 1998 Act by agreement, still less by conduct.

    (3) The question of waiver had not been raised in *Enviroflow*.

23. For those reasons the court severed the small portion of the decision awarding Late Payment Act costs and proceeded to enforce the balance.

## Conclusion

24. This is the first reported decision concerning the effect of a compromise of an adjudicator's decision entered into "subject to contract". It is likely that in many similar cases defendants will be given leave to defend the claimant's enforcement application to trial in view of the contested factual issues which performance of a "subject to contract" compromise often raise.

25. The court's analysis and conclusions in relation to reservations of jurisdiction are new and open up a potentially important lifeline to defendants wishing to take a late jurisdictional objection to enforcement of an adjudicator's decision. As HHJ Bird noted, his conclusion that the jurisdictional point in this case was incapable of being waived was not the subject of argument by the parties and did not reflect a submission made to him by Benchmark. What consequences this aspect of the judgment will have – and how, if at all, it is to be rationalised with the comprehensive analysis of waiver in adjudication by Coulson LJ in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* – are, for the present, open questions.

Harry Smith appeared for Aqua, instructed by Helix Law.

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*"The court's analysis and conclusions in relation to reservations of jurisdiction are new and open up a potentially important lifeline to defendants wishing to take a late jurisdictional objection to enforcement of an adjudicator's decision."*

# INTERVIEW WITH CHARLES BANNER QC

*"I have also been pleasantly surprised by the extent of the synergies between my practice and Keating's core areas, having already been instructed on construction matters concerning planning-related delay, and having followed colleagues' recent involvement in the Clin litigation, which recently reached the Court of Appeal."*

**• What influenced your move to Keating?**

As a barrister specialising principally in planning & environmental regulation, but also with a significant practice in public procurement and commercial dispute resolution in the development and infrastructure sector, I was attracted by the opportunity to join a chambers focused on that sector.

Clients and solicitors had also made clear the benefits of a 'life cycle' offer, servicing projects over their lifetime, from environmental and planning consenting, to public procurement, regulatory and project finance issues, to commercial disputes arising during or after the construction of the project. This is an approach that law firms have long since adopted. Combining my planning & environmental practice with Keating's pre-existing core practice areas offered an exciting chance to match that at the Bar.

Finally, having always had an international dimension to my practice ever since undertaking a 3 month Pegasus Scholarship in Hong Kong in 2008 (including a 2 month secondment at Mayer Brown JSM's planning and construction team), I couldn't fail to be impressed by Keating's market-leading international standing.

**• How have you found your first few months at Keating?**

It has been fantastic in every respect so far. On a personal level, everyone has been incredibly welcoming and, paradoxically, the pandemic and associated restrictions have made the transition easier as I've got to know people incrementally, and thus in more depth, as opposed to suddenly being presented with over 60 new faces.

On a professional level, the market reaction has been even better than expected, and I have been hugely impressed by the first rate practice management and BD team. I also already feel like a fully integrated member of the public procurement team, having undertaken several webinars and other marketing events with them in the 7 months since joining chambers.

Finally, I have also been pleasantly surprised by the extent of the synergies between my practice and Keating's core areas, having already been instructed on construction matters concerning planning-related delay, and having followed colleagues' recent involvement in the *Clin* litigation, which recently reached the Court of Appeal for the second time and which also concerned significant planning issues in the context of a construction dispute.



**• What has been the highlight of your career so far?**

Either the HS2 litigation in the Supreme Court or the Heathrow Expansion litigation in the High Court and Court of Appeal. These have without doubt been the two biggest infrastructure projects to be considered in England in my professional lifetime, and it was a privilege to have been involved in both. I also enjoyed the multi-disciplinary nature of each case: HS2 involved a mix of planning law, environmental law, EU law and constitutional law; Heathrow involved a mix of those three fields plus some heavy competition law in which I was up against several leading specialist competition silks, which was an enjoyable challenge. A close third would be the North-South Interconnector in Northern Ireland, on which I have been involved for over 5 years. It is widely regarded as Northern Ireland's most significant energy infrastructure project in history and the transboundary issues and the associated political and legal sensitivities have made it particularly interesting to have been involved in.

**• Have We Got Planning News for You, the weekly webcast, launched last year - did you have any idea it would be such a success?**

None at all! I conceived the idea having heard solicitors and other clients complain during the first lockdown about being bombarded with literally several emails a day from various organisations offering 'partisan' marketing webinars. It occurred to me that a joint venture with rival chambers, which whilst informative was also light hearted, would provide clients with a welcome break from this and hopefully lift spirits at the same time – and we also saw an opportunity to raise money for the NHS Clap for Carers campaign in lieu of a registration fee. But what started as something to keep people informed and entertained in the short term, as well as raising funds for a good cause, rapidly gained a life of its own – HWGPNFY has now had over 100,000 cumulative views, including over 14,000 for the episode we did on the Government's recent proposals for reforming the planning regime (which was recommended in a tweet by the Secretary of State responsible for those proposals, Rt Hon Robert Jenrick MP) – as I write this our most recent guest was the Archbishop of Canterbury, and next up are the TV Architect George Clarke, the Deputy Mayor of London Jules Pipe, and the Minister of Planning Rt Hon Chris Pincher MP. The HWGPNFY team were thrilled to be recently nominated for the Best Use of Social Media Award for the Legal Cheek Awards 2021 – which is ironic given I had absolutely no idea what Zoom or Teams were this time last year!

**• You took silk a couple of years ago, what change has that made to your practice?**

In relation to domestic advocacy work it has been evolution rather than revolution, as for a few years I'd been involved in silk-level cases, but it has had a noticeable impact on my profile in the international market where the QC brand carries a particular cachet, and also in relation to advisory work where for particularly complex or high value cases clients invariably require a silk's input. It also undoubtedly helped me secure my part-time judicial appointment as a Justice of the recently established Astana International Finance Centre Court in Nur-Sultan, Kazakhstan. That in turn has provided a wonderful opportunity to learn from the more senior judges on the court, including the Chief Justice Lord Mance (formerly Deputy President of the UK Supreme Court), with whom I attend regular judges' meetings.

**• Part of your practice is focused on public procurement work and you were involved in the Faraday case, did that influence your decision to join Keating?**

Absolutely. My public procurement practice is principally focused on public works contracts and was developed out of my planning practice, given the planning related nature of the development agreements which are often the subject of difficult public procurement issues. This led to my involvement in three of the most significant public works contract cases in the last decade – *Midlands Co-operative*, *Wylde* and *Faraday* (by some fluke for the successful party in each) – and I was for some time keen to build on this and grow my public procurement practice further. Keating's top drawer reputation in the field was a huge attraction and I've greatly enjoyed being part of the procurement team.

# PUBLIC PROCUREMENT AFTER BREXIT

By Simon Taylor

## The EU Rule Framework

Prior to Brexit, public procurement law in the UK was based on EU directives and general principles of the Treaty on the Functioning of the European Union (TFEU), in particular the principles of:

- Equal treatment.
- Transparency.
- Non-discrimination.
- Proportionality.

These principles were in essence designed to ensure that public bodies and utilities with monopoly rights were required to ensure that public tendering was transparent and accessible to economic operators from EU countries and conducted in a fair way which did not discriminate in favour of national providers. UK case law in this area was subject to the rulings of the Court of Justice of the European Union (CJEU) and the principle of sovereignty of EU law enshrined in the European Communities Act 1972.

The procurement directives were implemented into UK law by regulations. The current procurement regulations in force in England, Wales and Northern Ireland are:

- The Public Contracts Regulations 2015 (PCR 2015)
- The Concession Contracts Regulations 2016 (CCR 2016)
- The Utilities Contracts Regulations 2016 (UCR 2016)
- The Defence and Security Public Contracts Regulations 2011 (DSPCR 2011)

The effect of this rule framework and its interpretation in the UK is that there is a body of jurisprudence in the UK courts (mainly the TCC and appeal courts) which supplements and explains the statutory rules. In fact, the statutory rules have been amended (by the EU) over the past two decades to codify much of the jurisprudence and the regulations run to hundreds of pages.

The PCR 2015 also include a package of rules that are domestic in origin, being a product of UK government public procurement policy. These new rules are applicable, for example, to below threshold contracts.

The questions which arise following Brexit are (a) whether this complex and detailed rule framework has been swept away and (b) whether the UK courts are now free from the constraints of EU law?

As I explain below, the answer to both questions is not yet.

## Agreement on Government Procurement (GPA)

A further complication is that the EU rule framework is also designed to benefit economic operators from World Trade Organization's (WTO) countries who have signed up to the GPA. This reflects reciprocal rights that EU operators have to access certain public tenders in GPA countries outside the EU (such as the US and Canada).

While it was a member of the EU, and during the transition period (up to the end of 2020), the UK was part of the GPA through its EU membership.

The GPA is comprised of two parts:

- The main rules, which establish requirements for non-discrimination, transparent award procedures and remedies for affected suppliers.
- The market coverage schedules (or annexes) for each GPA party, which specify what procurement opportunities (including type, threshold value and exceptions) each party has agreed to open up to other GPA parties and will therefore be subject to the main GPA provisions.

Where a GPA party agrees in the annexes that certain goods, services or works are covered, it must generally (subject to general and specified exceptions) give suppliers situated in other GPA party countries the opportunity to bid for public tenders of those goods, services or works, with guaranteed rights to fair treatment and non-discrimination. By way of an example of a specified exception, Annex 5 (Services) of the EU (and UK) GPA schedules state that services are covered in respect of a particular GPA party's providers only to the extent that such party has covered the services in its own Annex 5. Similarly, Annex 2 (sub-central entities, such as local authorities) does not grant rights to US providers.

GPA parties must have "domestic review procedures" that allow suppliers to challenge breaches of the GPA or the national legislation giving effect to the GPA. The EU procurement directives (and procurement regulations) implemented the commitments that the EU made under the GPA. Accordingly, if the GPA applies to a public contract being awarded in the UK (because of the threshold and nature of the contract), a supplier in a GPA country has the same rights as an EU-based supplier and these rights are reflected in the procurement regulations.

Regardless of Brexit, therefore, the UK's intention of remaining part of the WTO 'family' and its commitment to international trade meant that it was always likely to maintain a GPA compliant public procurement regime.

In fact, the UK became an independent member of the GPA on 1 January 2021. The UK coverage schedules substantially replicate the EU coverage schedules under the GPA.

## Withdrawal from the EU: Legislation and Agreements

The *European Union (Withdrawal)* Act 2018 (EUWA) and *European Union (Withdrawal Agreement)* Act 2020 (WAA) prepare the UK's legislative framework for its withdrawal from the EU and give effect to the UK-EU Withdrawal Agreement of January 2020 (Withdrawal Agreement).

The effects of the EUWA and WAA include:

- Repeal of the European Communities Act 1972 and exit from the European Union on 31 January 2020 (exit day).

- A transition period up to 31 December 2020 (IP completion day) during which EU law including the procurement regulations would remain in full effect.
- Conversion of EU law into UK law. At the end of the transition period, the majority of EU law was converted into UK law, and EU-derived domestic legislation (such as the procurement regulations) which would otherwise have lapsed was preserved. This created a new body of retained EU law.
- Conferring powers to make secondary legislation, including regulations that deal with deficiencies (such as provisions which are no longer appropriate as they refer to the European Commission) in retained EU law.

The Withdrawal Agreement came into force when the UK left the EU on exit day, but many of the Withdrawal Agreement provisions deal with the period after IP completion day. These include a further transition period for procurements launched prior to the end of 2020, as explained below.

The following are the main Brexit SIs adopted under section 8 of the EUWA relevant to public procurement:

- Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319) (PPAR 2020). The PPAR 2020 amend the PCR 2015, CCR 2016, UCR 2016 and other retained EU law and existing UK primary legislation.
- Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 (SI 2019/697) and 2020 (SI 2020/1450) which amend the DSPCR 2011 and reduce the rights of non UK (and Gibraltar) bidders in relation to UK defence procurement. These changes are not covered by this article.

## The Substantive Changes

The sort of changes brought about by the PPAR 2020 are illustrated by the examples below. They are not major changes. The duties of equal treatment, transparency and proportionality will remain as will the detailed rules relating to the procedures to be followed, the selection and award criteria that can be applied and the available remedies.

- A UK e-notification service (Find a Tender) replaces the Official Journal of the European Union ("OJEU") as the site to be used for the publication of notices (eg advertising a tender). The Welsh and Northern Ireland equivalent national sites (eg Sell2Wales) can still be used to publicise tenders, but notices must first be placed on Find a Tender and national notices must not provide more detail than the official UK notice.
- The thresholds applicable to public tenders (the full set of rules and remedies only apply to above threshold contracts) are to be set biannually by the Cabinet Office Minister rather than the European Commission. The first set of thresholds are set out in the PPAR 2020 and resemble those applicable previously. In fact, the procurement thresholds are and will continue to be based on GPA thresholds.
- The Cabinet Office Minister (rather than the European Commission) can also adopt rules regarding the use of electronic communications in tenders.



- Under regulation 56 of the PCR 2015, the authority can refrain from awarding a contract to the most economically advantageous tender where they have established that the operator is non-compliant with international treaties relating to environmental, social and labour law entered into by the EU. PPAR 2020 gives the Cabinet Office Minister the power to ratify new treaties or de-ratify treaties for this purpose, subject to the consent of the devolved bodies (Welsh Ministers and Northern Ireland Department).
- Certain reports that are required under the Regulations could previously have been requested by the European Commission but may now be requested by UK bodies. In particular, reports prepared under Regulation 84 documenting decisions taken in the course of the procurement (such as grounds under Regulation 32 for concluding that the authority was able to conduct a negotiated procedure without a call for competition) may be requested by the Cabinet Office Minister (or the Welsh Ministers or Northern Ireland Department in relation to devolved authorities).
- Grounds under Regulation 69 for rejecting an abnormally low tender previously included the fact that the tenderer had received state aid and could not show that it was lawful under the TFEU. The reference to state aid is removed by the PPAR 2020.
- Regulation 25 of the PPAR 2020 disapplies any rights, powers, liabilities, obligations, restrictions, remedies and procedures in the field of procurement that are derived from Article 18 of the TFEU (non-discrimination on grounds of nationality) to the extent not already disapplied. However, for procurements caught by the PCR 2015 as amended, Regulation 18 continues to apply the principles of equal treatment, transparency and proportionality, which are the essence of the general principles of EU law

## Further Transition Period for Pending Procurements

The Withdrawal Agreement requires that procedures that were ongoing at the end of the transition period must be completed in accordance with EU law. Part 2 to the Schedule of the PPAR 2020 implements these "separation provisions". Paragraph 3 provides that "steady state amendments" (such as those above) do not affect any procedure launched under the PCR 2015 before, and not finalised by, IP completion day.

"Procedure" for these purposes includes a framework tender, a tender for a dynamic purchasing system and a procedure where the call for competition is a periodic indicative notice (PIN).

A procedure is "launched" when a call for competition or any other invitation to submit applications has been made in accordance with the PCR 2015 or, where the PCR 2015 do not require such a call or invitation, when the contracting authority contacted economic operators in relation to the procedure.

A procedure is "finalised" on (a) publication of a contract award notice in accordance with the PCR 2015, (b) conclusion of the contract where the PCR 2015 do not require the publication of such a notice, or (c) where the contract is not awarded, when the tenderers or persons otherwise entitled to submit applications are informed of the reasons why the contract was not awarded.

Where a framework agreement was concluded and had not expired before IP completion day or was concluded after IP completion day but the tender procedure was launched before IP completion day, steady state amendments do not affect any procedure relating to the performance of the agreement. This includes the award of call off contracts under the agreement.

## UK-EU Trade and Co-Operation Agreement

The UK and EU finally agreed a deal on their future trading relationship post Brexit on 24 December 2020. The text of the UK-EU trade and co-operation agreement (TCA) was published in the Official Journal of the European Union on 31 December 2020, subject to final legal linguistic revision. The European Union (Future Relationship) Act 2020 implements the future relationship agreements into UK law.

The TCA contains specific provisions relating to public procurement (Title VI: Public Procurement and Annex PPROC-1). The provisions incorporate the GPA rules (as between UK/EU procurement) and provide certain further rights, protections and clarifications for UK and EU operators. These include:

- **Wider coverage than GPA.** Covered procurement (that is, EU/UK procurement activity that is caught by the agreement) is broader than that provided for under the GPA. In particular, as under the PCR 2015, most of the 'light touch regime' services (e.g. educational, social, cultural services, hotel and restaurant services, legal services) are covered by the EU/UK commitments whereas these are not covered by the GPA schedules. The notable change from the position under the PCR 2015 is that healthcare services (including administrative services and the supply of medical personnel) are not covered. In addition, certain utilities are subject to the EU/UK coverage which are not covered by the GPA schedules, notably utilities providing gas and heat networks and privately owned utilities with special and exclusive rights.
- **National treatment beyond covered procurement.** When procuring a contract which is outside the scope of the GPA schedules as supplemented by the EU/UK Agreement (e.g. below threshold) and not within a specific exception (e.g. the healthcare exception), the procuring party must treat EU or UK suppliers (as the case may be) established in its territory through the constitution, acquisition or maintenance of a legal person, no less favourably than established suppliers from its own country (Chapter 3, Article PPROC.13). This is not a general equal treatment principle as it does not relate to cross border services. It is a provision which requires equal treatment in relation to EU suppliers established in the UK (and vice versa).

## Rights of Non-UK Bidders

Subject to the minor coverage changes set out above (and special rules for defence), non-UK bidders will effectively have the same rights to bid for UK procurement opportunities as they had before BREXIT.

GPA bidders will continue to have rights under the PCR 2015 provided the tender is within the relevant EU GPA schedule. EU bidders will continue to have similar but slightly broader rights on the basis of the coverage of the UK-EU Trade Agreement:

- Regulation 89 of the PCR 2015 (duty owed to EEA operators) has been amended by the PPAR 2020 to apply only to UK and Gibraltar economic operators.
- However, regulation 90 (duty owed to economic operators from certain other states), as amended by the PPAR 2020, now provides that, for a period of 12 months after 31 December 2020, the duty in regulation 89 (to comply with Parts 2 and 3 of the PCR 2015 and any enforceable retained EU procurement obligation in respect of a contract falling within Part 2) is a duty owed also to an economic operator from a GPA or EU country (where the contract is covered by a relevant EU GPA schedule)
- The regulation 90 rights will lapse on 31 December 2021, except in relation to procurements that commenced before that date. The explanatory memorandum to the PPAR 2020 indicates that, once the powers under the UK Trade Bill become available, the government will revoke and replace the above provisions. The UK's accession to the GPA on 1 January 2021 means that EU and other non-UK bidders from GPA countries will continue (after 2021) to have rights to bid for UK procurement opportunities to the extent that the UK's coverage schedules allow.
- As explained above, the TCA goes further in certain respects than the EU GPA schedules. Pending further changes, the PCR 2015 as amended should be read (by virtue of section 29 of the EU Future Relationship Act) as providing EU economic operators with rights in relation to procurements covered by the TCA.

## Relevance of CJEU Procurement Case Law

EU case law as at the end of 2020 is retained until such time as the higher courts make changes to precedent.

The treatment of CJEU case law post-transition for the purposes of the interpretation of retained EU law (which includes the procurement regulations) is dealt with in sections 6 and 7C of the EUWA as amended and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525). These set out the rules governing when the UK courts can or must follow previous EU case law and are summarised below:

- Retained EU case law means CJEU decisions and general principles of EU law developed by the CJEU, as they had effect in EU law immediately before the end of the transition period, and which relate to retained EU law.
- Retained EU case law is binding on the lower courts, until the Supreme Court or the Court of Appeal (or their closest equivalent courts in Scotland and Northern Ireland) depart from the retained EU case law, or until UK legislation modifies the relevant retained EU law that is being interpreted.
- When interpreting retained EU law which the UK has further modified post-transition, UK courts can decide whether or not to follow retained EU case law provided their interpretation is "consistent with the intention of the modifications".
- In deciding whether to depart from any retained EU case law, the Supreme Court must apply the test it would apply in deciding whether to depart from their own case law (whether it appears right to do so) and the Court of Appeal must apply the same test.
- Other than in the circumstances specified by the Withdrawal Agreement, UK courts are not bound by any CJEU decisions made or general principles developed after the end of the transition period, but may have regard to them, where relevant.
- Subject to limited exceptions in the Withdrawal Agreement, the UK will no longer be able to make referrals to the CJEU.

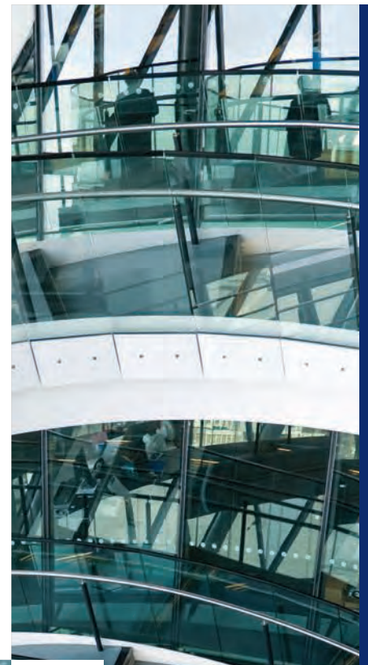
However, the effect of section 7C of the EUWA and the Withdrawal Agreement is that disputes relating to pending procurements (those launched before the end of 2020 as explained above) are to continue to be subject to principles set out in EU case law, even where the UK higher courts have diverged from those principles.

## Conclusion

While the mix of statute, regulation and international treaties introduced to enact Brexit is complex, UK public procurement law in 2021 very much retains the pre-Brexit status quo.

Change to the rules and case law will no doubt come but change will not be immediate.

The UK Government published a Green paper on Transforming Public Procurement in December 2020. This promises to simplify the rule framework. The reforms will be constrained by the GPA, but new guiding principles may be enshrined, procedures changed, rules consolidated into a single instrument and court procedures may also be revised. Consultation on outline proposals is under way and we will report on developments later in the year.



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