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.

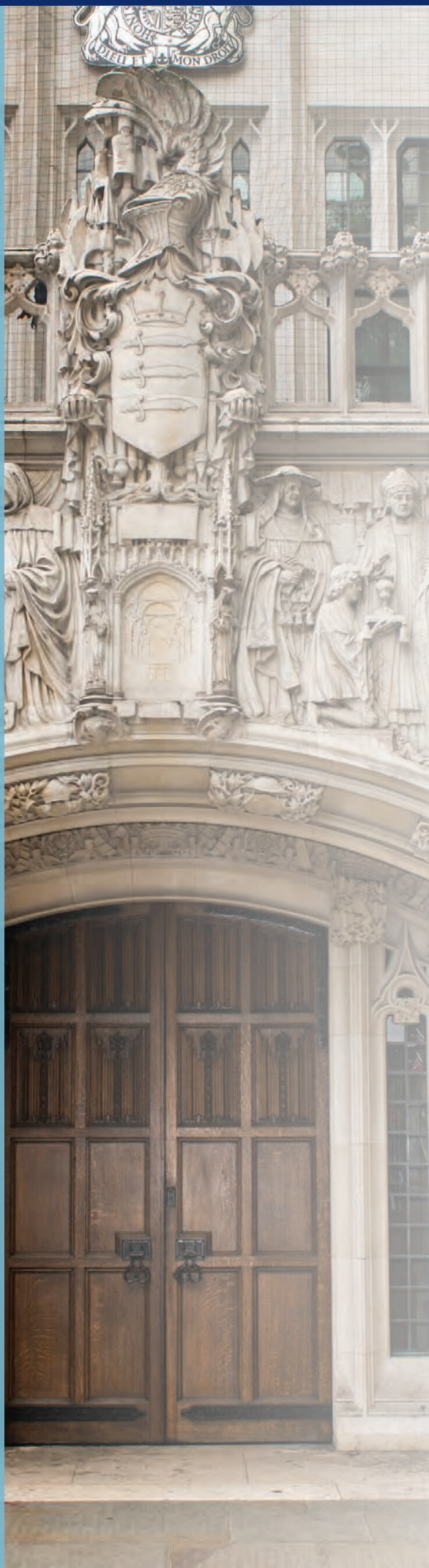
In an important judgment, the High Court (Lang J.) determined both these issues in favour of the First and Third Defendants, who resisted the claim (the Second Defendant, Teignbridge Council, did not participate in the proceedings) and dismissed the claim. Permission to appeal was refused.

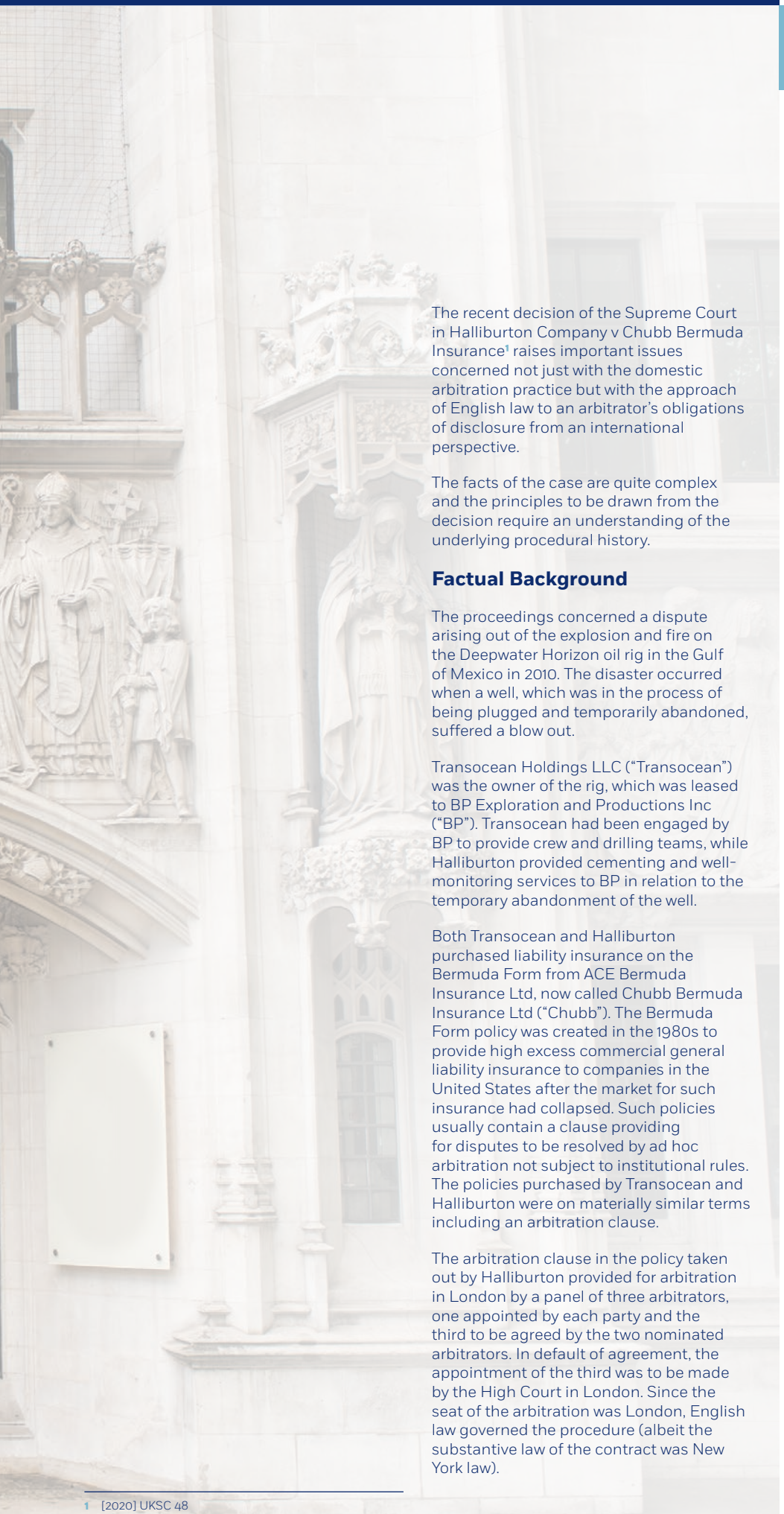
Charles Banner QC represented the Third Defendants.

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).

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.

1 [2020] UKSC 48

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").

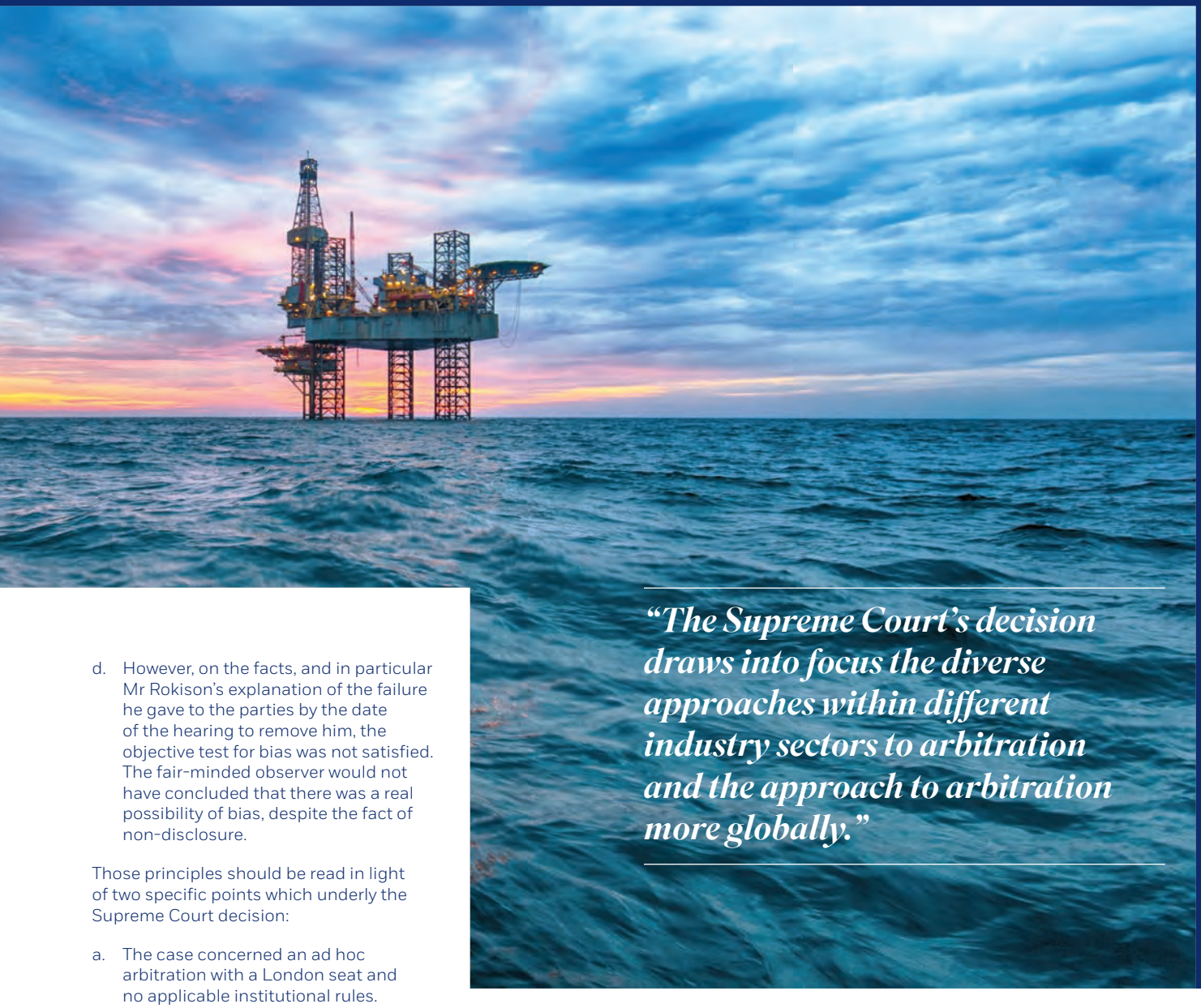
Interveners are parties not connected with the dispute itself but official bodies who were given permission to make submissions in the public interest. In addition to written submissions from all interveners, the ICC and LCIA were permitted to make oral representations at the hearing.

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

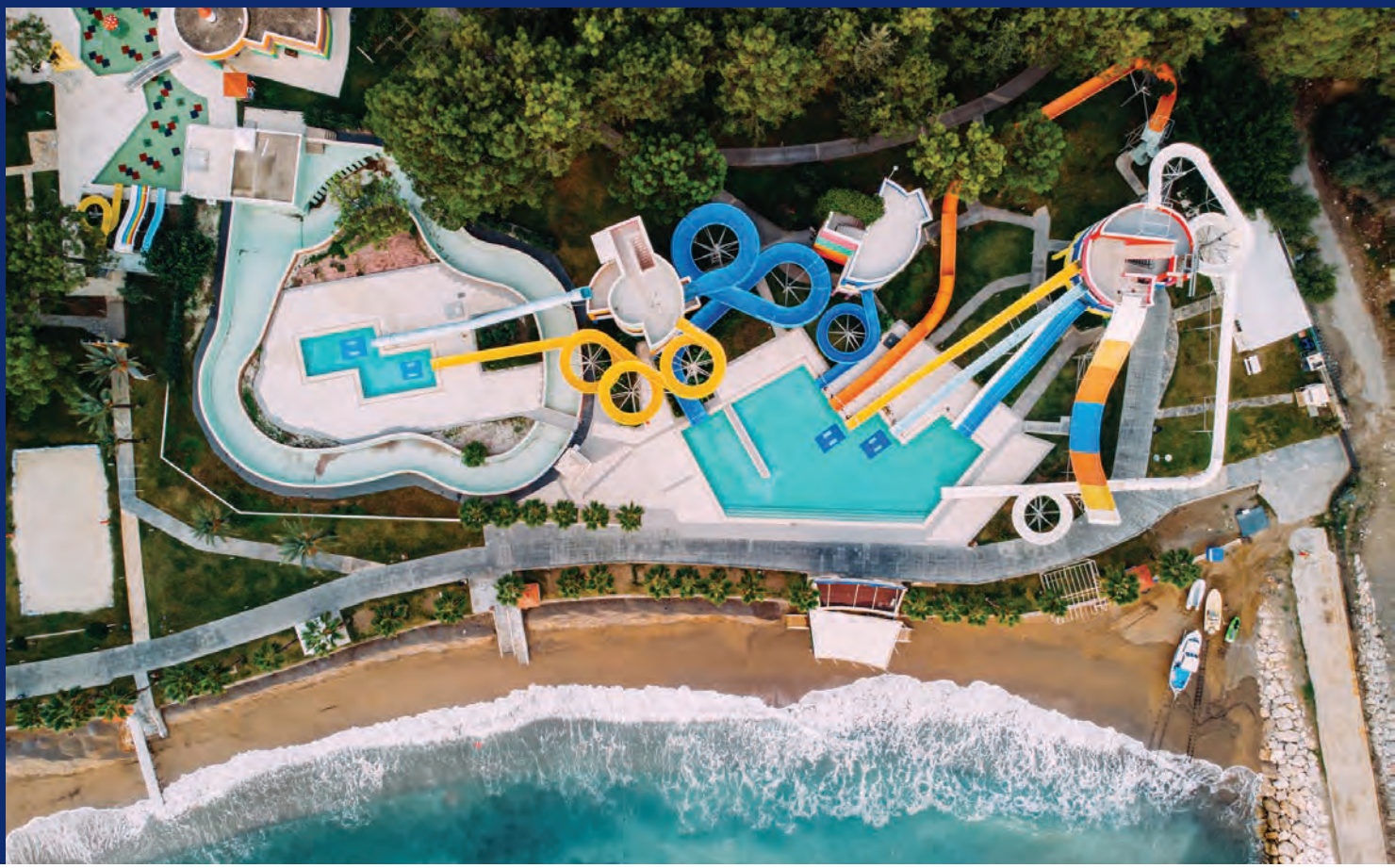
8. Section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 provides:

> **"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.

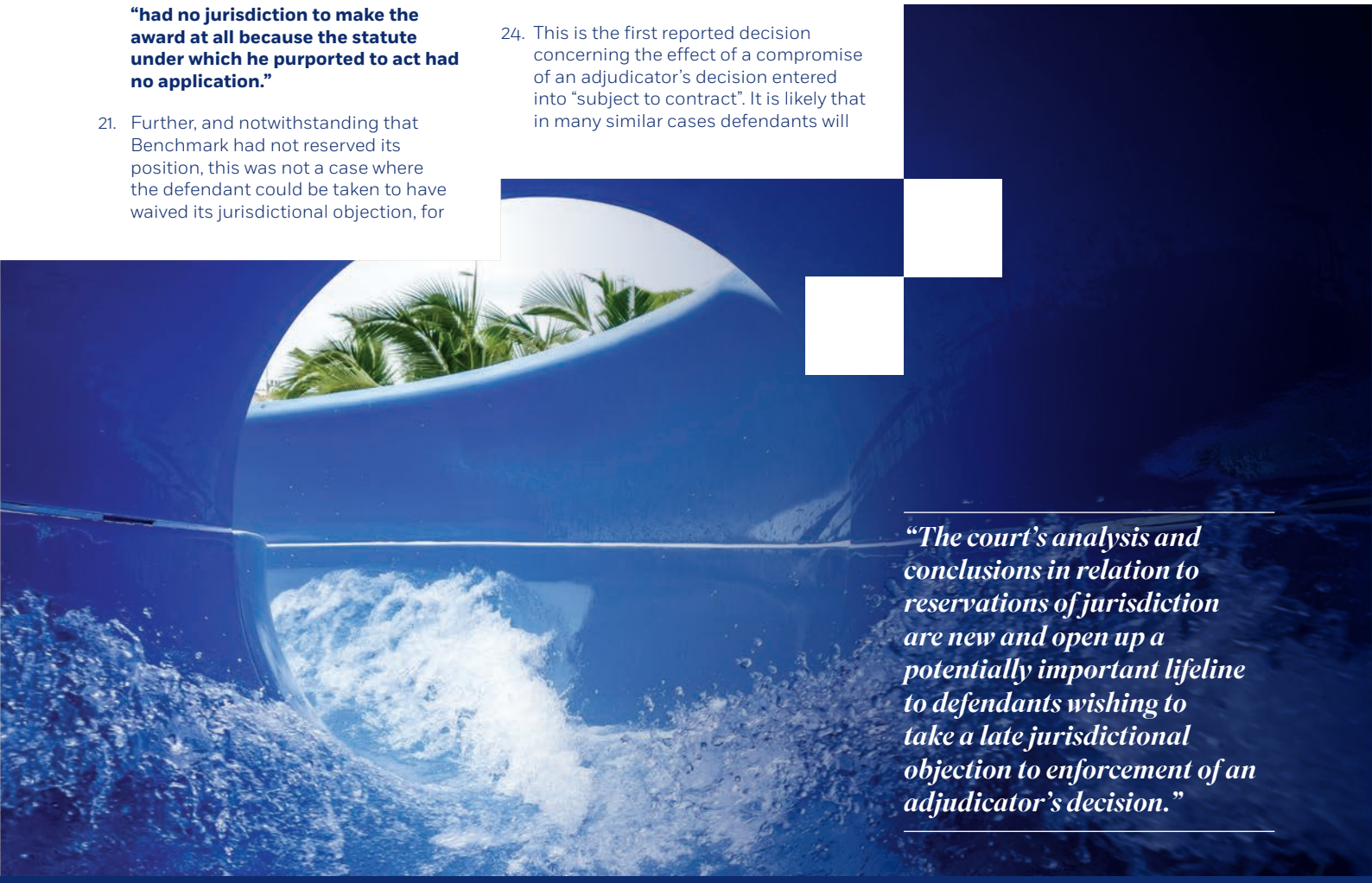
Conclusion

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.

This article was first published by Practical Law in December 2020



"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."