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.