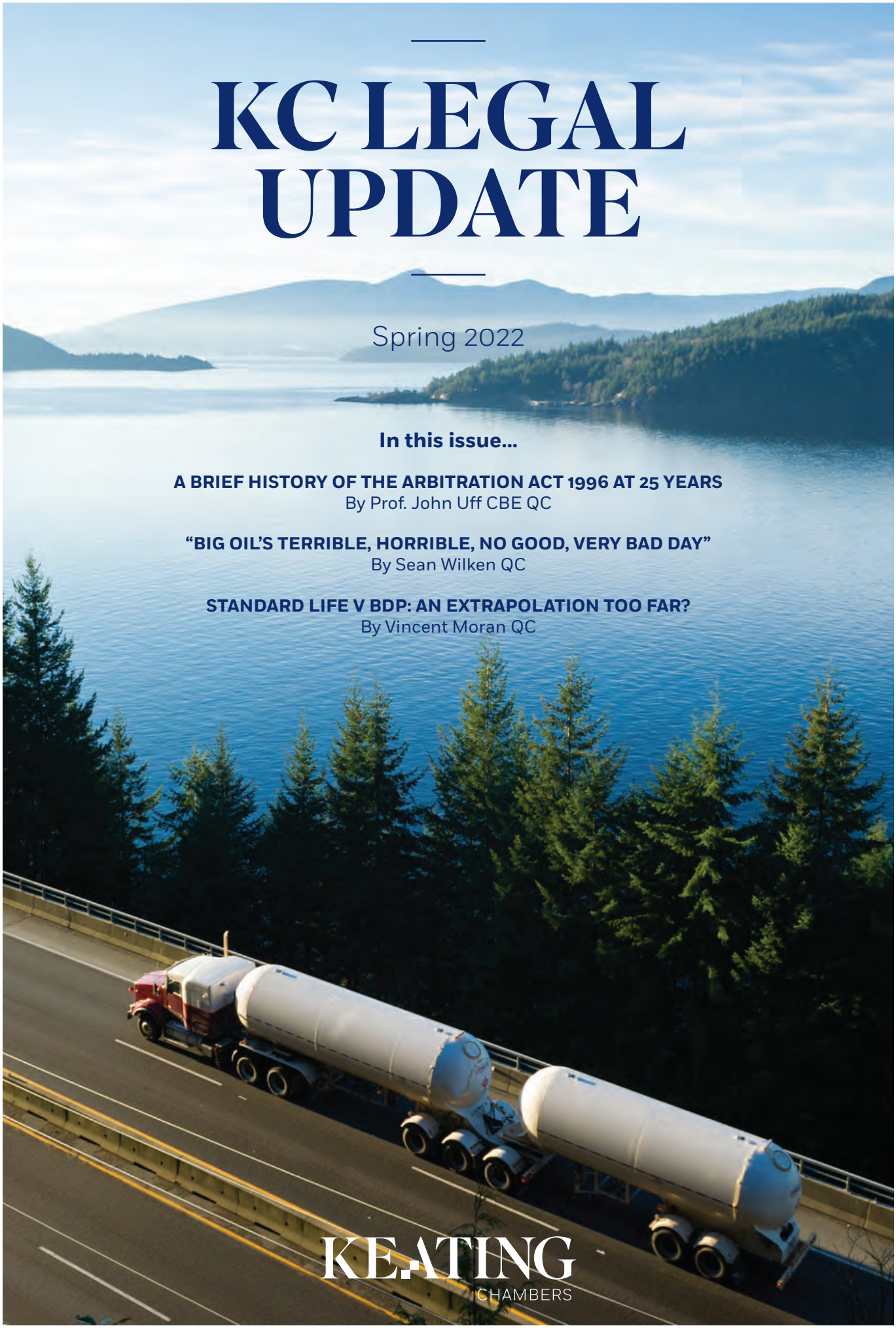


KC LEGAL UPDATE

Spring 2022

In this issue...

A BRIEF HISTORY OF THE ARBITRATION ACT 1996 AT 25 YEARS
By Prof. John Uff CBE QC

"BIG OIL'S TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY"
By Sean Wilken QC

STANDARD LIFE V BDP: AN EXTRAPOLATION TOO FAR?
By Vincent Moran QC

KEATING CHAMBERS

WELCOME

to the Spring 2022 Edition of KC LEGAL UPDATE

Since the last edition we have welcomed new members of staff across the clerking, marketing and operations teams, including a new Chief Operating Officer, Alison Crosland. Alison's role includes strategic development, regulatory compliance and oversight of the staff team. At page 12 she discusses her first 9 months at Keating, the challenges facing the Bar and why diversity and inclusion is so important to her and Chambers as a whole. We have also recently welcomed New Delhi based Ratan Singh as one of our international members, and we look forward to Alexandra Bodnar joining Keating Chambers at the end of March.

In other news, we were pleased to announce the full re-opening of our building with effect from Monday 21 February 2022. 15 Essex Street is now fully operational to welcome clients and visitors for meetings and events; and indeed, to welcome those who want to simply drop by to say hello. You will all be received with the warmest welcome. If you have any questions related to the re-opening of Chambers, please contact Alison or our Director of Clerking, Declan Redmond.

It's been a challenging couple of years, to say the least; and of course, for many in our families and communities, it has been the hardest of times. Keating Chambers is deeply appreciative to all its clients, both in the UK and internationally, for the tremendous loyalty and friendship shown throughout this period.

Your support has led to industry recognition for several Keating barristers over the last few months, for which we are also very grateful. This includes Rosemary Jackson QC being named Who's Who Legal's "Mediator of the Year" 2021, Sarah Hannaford QC being listed in The Lawyer's "Hot 100 for 2022" and David Thomas QC winning Chambers & Partners' "Construction Silk of the Year" 2021. David discusses the highlights of his career to date and challenges currently facing the construction industry in a Q&A on page 18. The rest of this issue covers key industry updates across arbitration, construction, energy and professional negligence.

Looking ahead to the rest of the year, we extend our congratulations to Calum Lamont, who will take silk with effect from 21 March 2022, and look forward to arranging a mix of in person, hybrid and fully virtually events. This includes a hybrid energy seminar on Wednesday 27 April; the details will be released on our website shortly, but you can secure your place early by getting in touch with me or any other member of the marketing team.

Marie Sparkes
Head of Business Development & Marketing

CONTENTS

04 **A Brief History of The Arbitration Act 1996 at 25 Years**
By Prof. John Uff CBE QC

06 **"Big Oil's Terrible, Horrible, No Good, Very Bad Day"**
By Sean Wilken QC

12 **Brief Encounters with Alison Crosland**
Chief Operating Officer

14 **Can You Exclude or Limit Liability for a Deliberate Breach of Contract?**
By Ben Graff

16 **Keating Cases**
A Selection of Reported Cases Involving Members of Keating Chambers

18 **Interview with David Thomas QC**

20 **Standard Life V BDP: An Extrapolation Too Far?**
By Vincent Moran QC

24 **Stays of Execution in Adjudication Enforcement: When are the Merits of the Underlying Claim Relevant?**
By Harriet Di Francesco

26 **Liquidated Damages and London Buses**
By Tom Coulson

A BRIEF HISTORY OF THE ARBITRATION ACT 1996 AT 25 YEARS

By Prof. John Uff CBE QC

31ST JANUARY 2022 MARKS THE 25TH ANNIVERSARY OF THE IMPLEMENTATION OF THE ARBITRATION ACT 1996; PROF. JOHN UFF CBE QC LOOKS BACK AT HOW THE ACT CAME INTO BEING, AND THE VARIOUS CHALLENGES ON THE WAY.

As one of the surviving members of the original DTI Advisory Committee on Arbitration Law I am conscious that most practitioners and certainly their clients will, today, have little notion of how the 1996 Act came into being. Sadly, the original chairmen, Lord Mustill and Lord Steyn, are no longer with us but both left a rich legacy of reports as did the third and final chairman, Lord Saville. The final reports[1] on the Bill, commenting on the sections in detail, give the impression that the production of the Bill was simply the result of applying the best available expertise; and the two reports on the working of the Act after 10 and after 20 years in operation have confirmed that there is no strong case for any major change. However, the Law Commission is currently considering a review of the Act and has put forward suggestions for topics for possible review including the introduction of a summary judgment-style procedure, a power to strike out unmeritorious claims, review of the procedure for challenge and appeal of awards and other issues. But it is clear that the basic structure of the Act will remain in its present form, and it is fitting for this quarter-century acknowledgement of the merits of the Act to recall how, to put it colloquially, it came to be as good as it is.

The 1996 Act replaced the Act of 1950 which was itself largely inherited in its form and content from the 1934 Act. Vestiges of both these Acts are still seen in various parts of the British Commonwealth where the local statute law has not yet been updated. One of the features of English arbitration law is the provision of various routes by which an Award may be challenged, particularly by an appeal on a point of law. In the older statutes this was by way of "case-stated" which required the arbitrator to express the decision in the form of a question of law to be referred to the court for decision. This reflects the long-standing English tradition of appointing "trade arbitrators" who were not expected to know the law, in contrast to the Civil Law system in which arbitrators were invariably lawyers thereby avoiding, supposedly, any need to appeal. By the 1970s the use of case-stated had become a serious problem for the increasing volume of international cases being heard in London, such that London was being accused (mostly by the French) of no longer being a fit place for international arbitration.

So come 1979, enter the Law Lords who, led by Lord Diplock, promoted and largely drafted the Arbitration Act of that year in which case-stated was abolished but replaced by a right of appeal, apparently intended to be available in only the rarest case, save that the Act itself did not make this clear. There were other "improvements" to the existing legislation but by the mid-1980s it was apparent to both users and practitioners that a new Arbitration Act was needed by the commercial community. Nevertheless, to convert a need into a new statute required a great deal more than goodwill. Something was needed to spur the Government into giving priority to Arbitration law over many other competing good causes. This was a challenge that was taken up by Arthur Marriott, a London solicitor and international arbitration practitioner. He took on the task, with a group of supporting law firms and chambers (including Keating), to raise funds to instruct a specialist draftsman to produce a model Arbitration Law, which was duly presented to the Department for Trade and Industry (DTI) and publicised throughout the profession. The result, after much delay, was the setting up of the DTI Advisory Committee (DAC), chaired by Lord Mustill. However, before considering the Marriott draft Bill the DAC decided that a more urgent task needed to be addressed, namely whether England and Wales should adopt the UNCITRAL Model Law on commercial arbitration, a draft law which had been issued in 1985 and was currently being adopted by many states throughout the world.

The outcome, which was not without controversy, was that Arbitration law in England and Wales was regarded as so well developed and so well embedded in commercial practises, that the Model Law should not be adopted but should be taken into account in the drafting of a new Bill. So it was that the DTI now set about the task of producing a new updated Arbitration law. But with little support from the Government, the DTI insisted on adhering to its traditional practises of producing recommendations which were then turned into draft legislation by the DTI's parliamentary draftsman and simply presented to the committee without any direct discussion or debate. The DTI also declined to take any account of the Marriott private draft despite its wide support. The resulting draft Bill contained much from the 1950 Act including the use of "implied terms" imported into arbitration agreements. A full draft was

1 The DAC issued two reports on the Arbitration Bill in 1996 which remain aids to construing the Act.

circulated in 1993 and was the subject of a major conference held at Kings College London, jointly organised with the Centre of Commercial Law, Queen Mary University. The theme taken up by many of the distinguished speakers was whether the commercial community should settle for what was regarded as "half a loaf". The overwhelming response of delegates was a resounding NO. The commercial community wanted something better!

At this point external factors began to play a role. The UK Government under John Major lost its parliamentary majority and, although it was to remain in office until 1997, it was clear that no controversial legislation could be put forward. Instead, the Government turned to draft legislation which would command general support and high on the list of potential Bills was Arbitration law and, incidentally, a Bill on construction contract reform. For the Arbitration Bill the rejection of the 1993 draft was duly noted and measures put in place to produce a new draft. Two important steps were taken at this point: first, the appointment in 1994 of Lord Saville to oversee the DAC; and second, the replacement of the DTI parliamentary draftsman by a new team with a forward (and European) approach to drafting. The new draftsman was Geoffrey Sellars who was, incidentally, also given the job of drafting the new proposals for what became the Housing Grants, Construction and Regeneration Act ("HGCRA"), which explains the use of common provisions in the two Acts. Lord Saville also brought into his secretarial team Toby Landau, (QC 2008) who became responsible for much of the research and collating needed to ensure the workability of the new Bill.

The new team was thus able to start afresh with a new draft Bill which bore little or no resemblance to the previous drafts and indeed started with an entirely new (and European) approach of setting out the General Principles on which the new Act was deemed to be founded (section 1). At the outset, the Act declares that the object of arbitration is *"to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"*; that the parties should be *"free to agree how their disputes are resolved"* subject to safeguards in the public interest; and that *"the court should not intervene except as provided"* in the Act, thereby settling many matters which had previously been either controversial or in doubt. For the still controversial issue of appeals, the Bill adopted the now well-embedded procedure of requiring leave, drafting into the Act the basis on which leave should or should not be given. It is of interest that this model has been adopted and adapted in other common law countries, where the merits of allowing some form of appeal on a point of law is recognised. Following the general principles, particularly on what is now universally known as "party autonomy", most of the rules governing the conduct of arbitration are drafted as provisions applying, subject to the parties' agreement.

The Arbitration Act 1996, as we now know it, was passed in the dying days of the Major government and came into force on 31 January 1997. Later that year Arthur Marriott's work was recognised by his appointment, along with Lawrence Collins, as the first solicitor QCs. But what of the Model Law? In his 1993 Freshfield Lecture, Lord Steyn referred to the Model Law as the single most important influence in the shaping of the Bill and that influence remained in the final draft Bill produced under Lord Saville. Still, England had decided against adoption. One of the members of the DAC, however, was Lord Dervaird, a former Scottish judge. After the DAC's activities had been concluded, Lord Dervaird chaired a Scottish committee which decided that, by contrast, Scotland would adopt the Model Law which it duly did by the Arbitration (Scotland) Act 2010. However, the English Act has continued to be used as a model for arbitration law reform in many other common law countries including Australia, New Zealand and Singapore. In most cases the Model Law has been made available as an option, following the principle of party autonomy.

In the field of construction disputes, the HGCRA was enacted at the same time as the Arbitration Act and brought in the statutory right to Adjudication in respect of any dispute falling within that Act, which has included the great majority of domestic construction disputes. However, the principle of party autonomy also applies to adjudication, so that arbitration remains an alternative to adjudication as well as the forum for a re-hearing where the Adjudicator's decision is challenged. But for international construction disputes, Arbitration remains the overwhelmingly preferred forum, whether the dispute is seated in London or elsewhere. Annual statistics from the ICC and elsewhere regularly confirm London as one of the most favoured venues for multi-national arbitrations where, in most cases, the Arbitration Act 1996 will apply including the supportive powers of the English courts and, unless contracted out, the procedures for challenge and appeal. The 1996 Act has thus come of age but can look forward to more decades of successful application in the service of both the UK and the international commercial community.

"BIG OIL'S TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY":[1] CLIMATE CHANGE LIABILITIES FOR THE OIL AND GAS AND MINING INDUSTRIES

By Sean Wilken QC[2]

1 FT Energy Source 26 May 2021

2 A short version of this article was published at the end of May 2021. This is the expanded and updated version

On 26 May 2021, three things happened which appear to have signalled a significant change in direction for those involved in the oil and gas and mining industries.[3] The first was the appointment of two new directors at ExxonMobil. This might seem not to be significant save for the fact that these two new directors came from a slate prepared by Engine No 1, "a hedge fund that has waged a proxy campaign since December 2020, saying the oil and gas group's focus on fossil fuels had put it at "existential risk"".[4] Second, a large majority of Chevron's shareholders voted for a resolution calling for Chevron to substantially reduce its scope 3[5] emissions or those from the products it produces.[6] Third, the Hague District Court handed down judgment in *Milieudefensie v Royal Dutch Shell Plc* ("RDS").[7] RDS in turn followed *Urgenda v State of the Netherlands* ("Urgenda").[8] In Urgenda, the Court ordered the Dutch State to reduce its Greenhouse Gas Emissions ("GHG") by 25% stating that Articles 2 and 8 of the European Convention on Human Rights ("ECHR") were in play. In RDS, the point was expanded to order Royal Dutch Shell to reduce its emissions across the board by 45% by 2030. Although many companies had already been addressing GHGs, RDS sent a seismic shock wave through those involved in the extraction, production and supply of hydrocarbons in whatever form.

This article considers what Urgenda and RDS decided recognising both that RDS is being appealed and that some but, it is important to note, not all of the reasoning in both cases is based on Dutch law. This article will then go on to consider subsequent developments since RDS and the potential impact on the oil and gas and mining industries from the perspective of both international arbitration and the law of England and Wales. The article will conclude with a consideration of the practical ramifications of Urgenda and RDS as things currently stand.

The decisions

Urgenda was a decision of the Supreme Court where the claim was directed at the State invoking the ECHR. The argument was that anthropomorphic climate change represented a threat to life (Article 2) and to private life (Article 8) to the citizens of the Netherlands and that the State had to respond to those threats. To an English lawyer, invocation of the ECHR against the State is not problematic. After all, the Human Rights Act 1998 ("HRA") bites on *public* bodies.[9] Further, the decision that anthropomorphic climate change exists and is dangerous,[10] whilst politically toxic to some, is not scientifically surprising. Similarly, that Article 2 imposes on a state a positive obligation to do something – as opposed to avoiding doing something – is not surprising. The Article itself provides "Everybody's right to life shall be protected by law" and the gradual creation of overall positive obligations on States has been a feature of the ECHR since the *Belgian Linguistics* case.[11]

There were, however, four striking features about Urgenda. First, the use of a legal challenge as an avowed element of an overall activist strategy on climate change. Second, the application of Article 2 to the population in general against a worldwide threat.[12] Third, an acknowledgement that, although climate change was a world-wide problem, each state bore an obligation to seek to address it (the so called "do its part" concept).[13] Fourth, the Court's reasoning as to why it was, according to the government, engaging in a political debate was new. The Court held that, whilst the debate was political, it was for the Court to determine when a political decision fell out with the acceptable parameters and then order the public body to remedy the situation by means that the public body felt to be appropriate.[14]

RDS represents a stage further. In RDS, the issue was the Court's ability to impose climate change obligations on a private company at the suit of campaigners. The Court's route in was Royal Dutch Shell's' standard of care[15] to Dutch residents and inhabitants of the Wadden region in the Netherlands.[16] In considering that standard of care, the Court took into account 14 factors – including Royal Dutch Shell's ability to set policy; the applicable human rights and international law elements; and proportionality and onerousness of any obligation imposed on Royal Dutch Shell.

Parts of the RDS decision would not be surprising to a lawyer before the Courts of England and Wales. The Court accepted that the Claimants could not directly invoke the ECHR against Royal Dutch Shell,[17] instead the ECHR contextualised the analysis of a standard of care, which embraced both the ECHR and public international law. This standard of care most closely resembled a tortious responsibility under English law.

Again, however, there are striking features to RDS. First, the "do its part" theorem was again deployed – this time against a private company to implement the non-binding Paris Agreement[18], and despite the agreed fact that tackling climate change was not within the sole gift of that private company but was a global multi-factorial problem.[19] Second, whilst causation (that is the difficulty of ascertaining that this emission by Royal Dutch Shell was the cause of harm to the Claimants) was in issue, the Court sought to resolve this by contending that all players responsible for major GHG emissions had to play their part.[20] Third, the need to supply energy was no answer – supply had to be within the confines of the need to regulate GHGs.[21] Fourth, cap and trade would absolve Royal Dutch Shell of its obligations where the particular emissions were caught by the

3 That Total's shareholders voted in a similar fashion on 28 May 2021 suggests there may be a consensus on this issue

4 https://www.ft.com/content/da6dec6a-6c58-427f-a012-9c1efb71fddf

5 Scope 3 emissions are those so defined in the Greenhouse Gas (GHG) Protocol. These are all the indirect GHG emissions (other than purchased electricity, heat and steam) created by a company

6 https://www.ft.com/content/fa9946b9-371b-46ff-b127-05849a1de2da

7 C/09/571932 / HA ZA 19-379.English language version is at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339

8 19/00135. English language version is at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007

9 See section 6(1)

10 Paras 4.1 – 4.8

11 Belgian Linguistic (No 2) (1968) 1 EHRR 252 para 7

12 See paras 5.2.1 – 5.5.3

13 See paras 5.6.1 – 5.8 and 6.1 – 7.3.6

14 See para 8.2.6

15 See paras 3.2; 4.4.1

16 See paras 4.4.1 – 4.4.3

17 See para 4.4.9

18 See paras 4.4.26 – 4.4.27

19 See paras 4.4.33; 4.4.51

20 See paras 4.4.37 – 8

21 See paras 4.4.42 – 43

cap and trade system.[22] Fifth, the threat posed by climate change was sufficiently serious to render even onerous obligations on Shell proportionate.[23]

Subsequent developments

On 17 June 2021, a Belgian Court handed down judgment in *VZW Klimaatzaak v. Kingdom of Belgium* ("VZW").[24] The Court followed *Urgenda*[25] in its application of Articles 2 and 8 of the ECHR, in the direct impact climate change would have on the Claimants, in the analysis of the global threat posed by anthropomorphic climate change and the individual responses to that and in the imposition of a duty of care on the State in relation to climate change and GHGs.[26]

What the Court then did, however, was to decide that what was required was a process of putting into place mitigation measures. What the Court did not require was a specific outcome (in terms of a level of reduced GHG emissions). Thus, VZW did not go as far as either Urgenda or RDS. Further the Court held that the nature of the mitigation measures was a question for the State to decide not the Court (at least at this stage). This had an important consequence for the application of Articles 2 and 8 of the ECHR. It meant that any decision by the State fell within the State's "margin of appreciation". The margin of appreciation is the scope within which the State may exercise its judgment and reach decisions without infringing the ECHR and is a concept that exists throughout the ECHR[27] as a form of judicial deference to individual State's practices. The margin of appreciation therefore places an important brake on the Court's ability to intervene as if the decision falls within the margin of appreciation, then Articles 2 and 8 of the ECHR would not be infringed.[28] By the end of the summer of 2021, it was clear that both RDS and VDW would be appealed and the outcomes of those appeals are awaited.

In November 2021, COP 26 occurred in Glasgow. Although little in terms of actual relevant law was passed in relation to oil and gas extraction,[29] COP was marked by a series of statements that the successful Claimants in RDS would be actively campaigning to bring about climate change litigation, even issuing a "how to" manual to that effect.[30] These sentiments have been echoed by their legal team.[31] At the same time, this legal pressure was and is being apparently matched with or complemented by investor pressure.[32]

Finally, on 21 December 2021, the English Administrative Court handed down a decision on a renewed application for permission[33] in *R (Plan B Earth) v The PM & Ors* ("Plan B").[34] There were numerous procedural difficulties facing the Claimants, acting in person, on the application,[35] but the Claimants did argue and the Court did consider arguments based on *Urgenda*, the ECHR and the Paris Agreement and said as follows:

> 25. *Unincorporated treaties such as the Paris Agreement do not form part of domestic law, and domestic courts cannot determine whether the UK has violated its obligations under an international treaty: R (SC) v SSWP [2021] UKSC 26, [2021] 3 WLR 428 per Lord Reed at [77], [84] and [91].*
>
> 50. *Moreover, the [climate change] framework consists of high level economic and social measures involving complex and difficult judgments. As Lord Reed recently explained in R (SC) v Work and Pensions Secretary [2021] UKSC 26, [2021] 3 WLR 428 at [158], the State enjoys a wide margin of appreciation in matters of that kind. Whilst all the circumstances must be taken into account, it remains the position that the judgment of the executive or legislature in such areas "will generally be respected unless it is manifestly without reasonable foundation".*
>
> 51. *That approach respects the constitutional separation between the Courts, Parliament and the executive. It also reflects the fact that the Court is not well equipped to form its own views on the matters in question. I am being invited to adopt the views expressed in selective quotations from the work of the CCC and others. When I refer to selective quotation I am not questioning the good faith of any of the parties. Rather I am pointing out that the Court does not have and cannot acquire expertise in this complex area, and will always be dependent on competing extracts from a global debate. Even if I could overcome the problem of selective quotation, I would not be equipped to assess the correctness of what is being quoted.*
>
> 52. *In that regard a further problem arises from the Claimants' reliance on the Paris Agreement. Mr Crosland has explained that he is not trying to enforce an unincorporated international treaty in this Court. To do so would fall foul of the Supreme Court's ruling in SC to which I refer at [25] above. Rather he relies on the Paris Agreement as evidence of fact, to show that a failure to limit the temperature increase to 1.5°C above pre-industrial levels poses the threat to life on which the claims are based, and that there is an international consensus to that effect.*
>
> 53. *The problem is that the Claimants are using compliance with the Paris Temperature Limit as a test for compliance with Article 2 (and Article 8). The effect is that the Court is being asked to enforce the Paris Agreement, contrary to the guidance in SC.*
>
> 54. *Whether or not that is so, these claims invite the Court to venture beyond its sphere of competence. In my judgment the framework established by the 2008 Act should be allowed to operate. It contains provision for debate, and that debate occurs in a political context with democratic, rather than litigious, consequences.*
>
> 55. *Mr Crosland suggested that the Courts in some other countries have been willing to decide issues of this kind. He drew my attention to the decision of the Dutch Supreme Court in Urgenda v The Netherlands, ruling that the Dutch State was obliged to reduce greenhouse gases in the Netherlands by at least 25% by the end of 2020 compared to 1990. I have not been given any comparison of the constitutional laws in play and between the powers of the Dutch and English courts in such matters. However, I note that the challenge in Urgenda was not to a framework of laws, but rather to a change in the State's reduction target. Previously the State pursued a 30% reduction by 2020 but this was lowered to 20% in 2011. According to the Supreme Court:*

22 See paras 4.4.44 ff

23 See paras 4.4.53 – 55

24 Tribunal de première instance francophone de Bruxelles, Section Civile-2015/4585/A. The English version (informal translation) can be found at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-2.pdf

25 RDS did not feature in the judgment.

26 See p 61

27 And the HRA

28 See pp 62 and 82

29 COP 26 did, however, see the agreement of the Glasgow Climate Pact phasing down coal usage.

30 See https://en.milieudefensie.nl/news/friends-of-the-earth-netherlands-launches-its-manual-for-the-climate-case-at-the-climate-summit-in-glasgow

31 See FT 17/12/21 "Lawyer who defeated Shell predicts an "avalanche" of climate cases" at https://www.ft.com/content/53dbf079-9d84-4088-926d-1325d7a2d0ef

32 See FT 20/12/21 "Oil majors under pressure as activists circle" at https://www.ft.com/content/0e5a0373-ee69-438a-9026-4588338f6ee4

33 Applications for permission are based on arguability and do not have status of precedent. They are, however, a useful indicator of the English Court's approach to the issues

34 [2021] EWHC 3469

35 See [6] which set out the grounds on which the application was refused on paper

"The State has not explained, however, that – and why – a reduction of just 20% in 2020 is conserved responsible in an EU context, in contrast to the 25-40% reduction in 2020, which is internationally broadly supported and is considered necessary."

I need not and do not decide whether a similar challenge could have been viable in this jurisdiction.

The legal impact

Turning to the impact of these decisions, as far as international arbitration is concerned, Urgenda, RDS and VZW may not be ground-breaking. The ability of Claimants to explore environmental concerns in international arbitration has already been considered on several occasions leading to a relatively substantial body of case law.[36] Thus, as far as international arbitration is concerned, the justiciability (albeit not the ultimate success) of an RDS type argument is not new. What is obviously new but not unthinkable in international arbitration is the imposition of positive obligations in relation to a generalised threat.[37]

Under English law, however, there are significant obstacles to an RDS type claim – both substantively and procedurally. As can be seen, Plan B encountered most of them.

First, as set out above, it would be exceptionally difficult to invoke the ECHR/HRA against a private company. The HRA is targeted at public bodies[38] and private companies are usually not "public bodies"[39] and therefore the HRA simply does not apply. A claim against a private company would therefore fall at this first and fundamental hurdle.

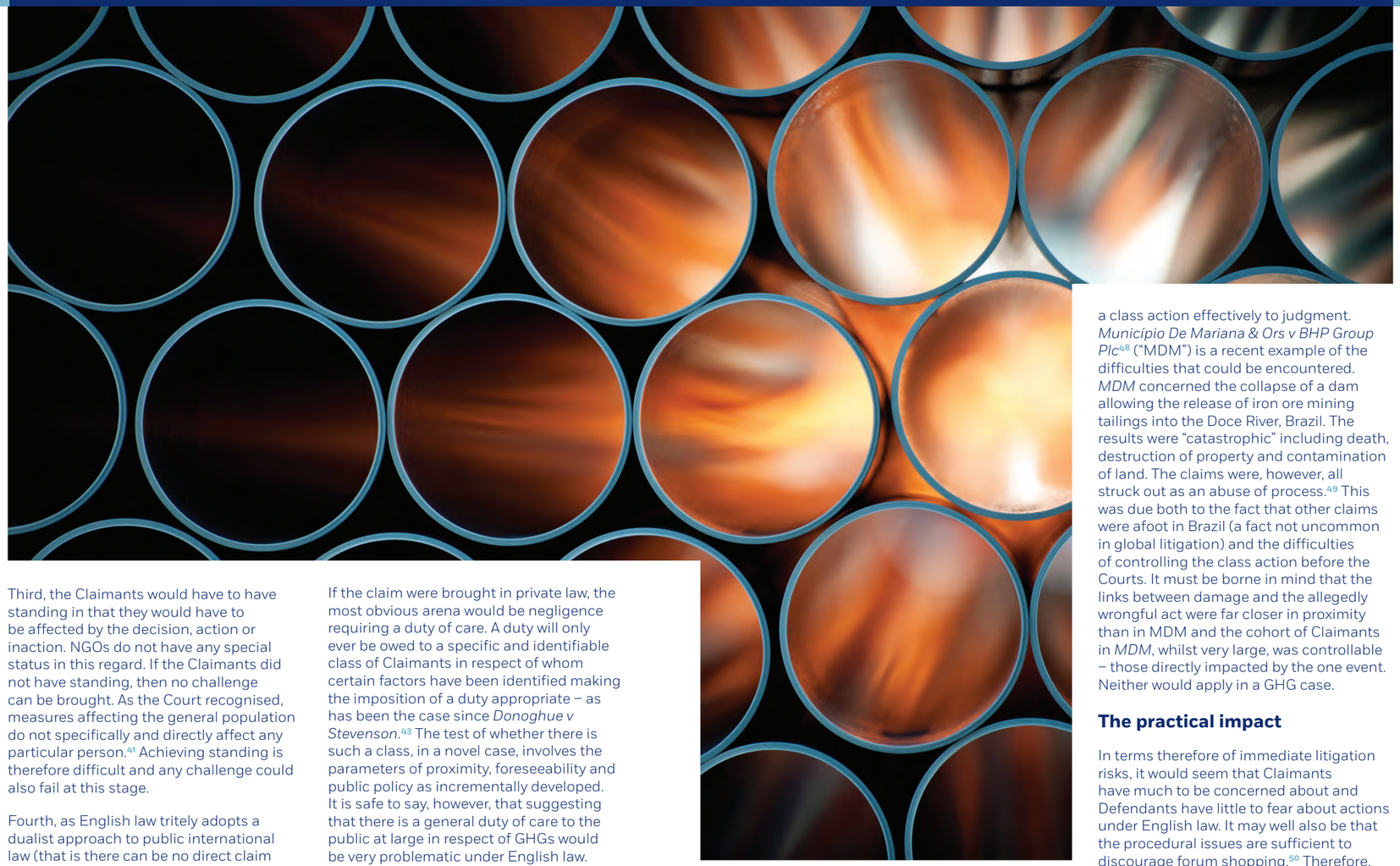
Second, even if the claim were made against the State, the State would still possess a significant margin of appreciation – as VWZ recognised. Further, it is well established in English public law that, in complex questions of fact and policy, the Courts will allow the State a considerable degree of latitude and a considerably greater degree of latitude where the State's decisions would involve questions of political, economic and scientific judgment.[40]

Third, the Claimants would have to have standing in that they would have to be affected by the decision, action or inaction. NGOs do not have any special status in this regard. If the Claimants did not have standing, then no challenge can be brought. As the Court recognised, measures affecting the general population do not specifically and directly affect any particular person.[41] Achieving standing is therefore difficult and any challenge could also fail at this stage.

Fourth, as English law tritely adopts a dualist approach to public international law (that is there can be no direct claim under a public international law instrument unless the instrument is incorporated into domestic law)[42] any direct claim under the international instruments would be very difficult, if not impossible, to maintain. As the Court in *Plan B* pointed out, agreements like the Paris Agreement (and presumably any reached after COP 26) are purely international agreements which are not incorporated into domestic law.

Thus, a claim under the public law and/or the ECHR/HRA before the Courts of England and Wales would be fraught with difficulty.

If the claim were brought in private law, the most obvious arena would be negligence requiring a duty of care. A duty will only ever be owed to a specific and identifiable class of Claimants in respect of whom certain factors have been identified making the imposition of a duty appropriate – as has been the case since *Donoghue v Stevenson*.[43] The test of whether there is such a class, in a novel case, involves the parameters of proximity, foreseeability and public policy as incrementally developed. It is safe to say, however, that suggesting that there is a general duty of care to the public at large in respect of GHGs would be very problematic under English law. Further difficulties would be created by the need to establish causation. The Dutch court assumed that the output of GHGs by Shell were in part responsible for increased temperatures in the Netherlands. It is likely, however, that the English Courts will require a greater level of proof and granularity than that. There could be particular difficulty in showing that, where there were multiple causes of GHG emissions, it was the emissions from one particular Defendant that were the cause of the increase in temperature. There would be further difficulties in showing that the increase in temperature also caused the harms complained of. Nor would framing the case in nuisance necessarily assist.



Although allowing noxious fumes to pass onto the property of another may amount to nuisance,[44] as will transmitting heat,[45] it would require a considerable extension for nuisance to extend to GHG emissions[46] in potentially another country and that is without taking into account that any supposed nuisance would have to reach a sufficient degree of interference.[47]

Procedurally, RDS was a class action – and elements of that class action ran into difficulties in the Netherlands. Experience in England and Wales suggests that there would be significant difficulties in bringing a class action effectively to judgment. *Município De Mariana & Ors v BHP Group Plc*[48] ("MDM") is a recent example of the difficulties that could be encountered. *MDM* concerned the collapse of a dam allowing the release of iron ore mining tailings into the Doce River, Brazil. The results were "catastrophic" including death, destruction of property and contamination of land. The claims were, however, all struck out as an abuse of process.[49] This was due both to the fact that other claims were afoot in Brazil (a fact not uncommon in global litigation) and the difficulties of controlling the class action before the Courts. It must be borne in mind that the links between damage and the allegedly wrongful act were far closer in proximity than in MDM and the cohort of Claimants in *MDM*, whilst very large, was controllable – those directly impacted by the one event. Neither would apply in a GHG case.

The practical impact

In terms therefore of immediate litigation risks, it would seem that Claimants have much to be concerned about and Defendants have little to fear about actions under English law. It may well also be that the procedural issues are sufficient to discourage forum shopping.[50] Therefore, outside of international arbitration, to what extent, if at all, does RDS matter?

There are, in my view, a number of answers to that.

First, those working in oil and gas and mining are involved on a global scale. Although the litigation risks in England and Wales are such as to discourage claims, that does not preclude claims elsewhere in more favourable jurisdictions. Subject to enforcement and/or conflicts of law, those claims can be repatriated.

Second, there will undoubtedly be a degree of interaction between the RDS-type liability and corporate social responsibility. Whilst corporate social responsibility does not have an impact on litigation (at least not as a matter of hard law), it does have an impact on share prices and credit lines (as well as shareholder views). It is reasonable to expect that RDS-type liability will have an impact on the underlying economics of the industry. Many companies have already voluntarily been exploring this – there is now, however, the added dimension of legal compulsion.

Third and allied to that, companies whose profitability is linked to release of GHGs are going to have to reconsider that asset base in the long term – diversifying into renewables and green energy. Similarly, it would be reasonable to expect that costly, long-term deep-water exploration for hydrocarbons will become less attractive. This will ultimately mean fewer of those projects and less investment in the associated technology, engineering and hull and asset provision industries.

Fourth, the main target of RDS was scope 3 emissions. As set out above, these are indirect emissions from and by the supply and value chain. Scope 3 emissions are not confined to the oil and gas majors.

Fifth, as is apparent from the statements from *Milieudefensie*, it is reasonable to expect legal challenges to form part of an overall framework of climate change activitism – including targeting from investors and shareholders as well as from NGOs and pressure groups.

Thus, it is reasonable to expect that there will be an increasing level of risk in relation to climate change. This risk will not only affect the companies actually involved in extraction, but all those that work with them: shipping;[51] ship building; rig and FSPO manufacture; supply and maintenance; subsurface engineering and construction and so on. Each of these industries, whilst not an immediate and direct target of an RDS type of challenge, will have to consider its approach to GHGs, how it can fit into a limited scope 3 emission model and how it can, in its own supply and value chain, also make scope 3 emission gains.

36 This is set out in Wilken & McMillan "Stranger Things: New Obligations in International Investment Treaties and Arbitrations" https://www.keatingchambers.com/wp-content/uploads/2020/12/KC-Legal-Update-Winter-2020-Stranger-Things.pdf

37 The cases involving water rights in international arbitration (see Wilken & McMillan op cit) already envisage the possibility of positive obligations in relation to a generalised threat.

38 See section 6

39 See eg RSPCA v Attorney General [2002] 1 WLKR 448 at [37] and R (West) v Lloyds of London [2–4] EWCA Civ 506 at [39]

40 See Fordham Judicial Review Handbook 7th Ed at section 13 for a review of the various forms that this judicial restraint or soft review may take, a detailed discussion of which lies outwith this article.

41 See Plan B at [21 – 22]. This is a narrower approach than adopted in the Netherlands or Belgium on this issue.

42 See most recently Heathrow Airport v HMT [2021] EWCA Civ 783 at [135 ff] for a discussion of the principles in the context of the WTO/GATT.

43 [1932] AC 562 at 580. The case's anniversary is also 26 May.

44 Crump v Lambert (1867) L.R. 3 Eq. 409; St Helens Smelting Co v Tipping (1865) 11 H.L.C. 642; Salvin v North Brancepeth Coal Co (1874) L.R. 9 Ch. 705; Manchester Corp v Farnworth [1930] A.C. 171

45 Sanders-Clark v Grosvenor Mansions Co [1900] 2 Ch. 373; Reinhardt v Mentasti (1889) 42 Ch. D. 685

46 GHG emissions might well also be viewed in the same way as television signals were in Hunter v Canary Wharf [1997] AC 655 at 727.

47 See Barr v Biffa Waste Services [2012] EWCA Civ 312 at [36]. The position is different in international law due to the so called Trail Smelter principle.

48 [2020] EWHC 2930 (TCC)

49 Judgment is awaited on the appeal from this decision

50 The position on forum shopping will obviously be impacted by the conflicts of law impacts of Brexit including, for example, the current impasse over the Lugano Convention. Such issues lie out with the scope of this article.

51 Just as this article was going to press, news broke that Eastern Pacific Shipping announced that it was implementing a No Coal Cargo Policy to reduce GHG emissions – see https://splash247.com/eastern-pacific-details-no-coal-cargo-policy/

BRIEF ENCOUNTERS WITH

ALISON CROSLAND, CHIEF OPERATING OFFICER

Alison Crosland joined Keating Chambers in June 2021 as Chief Operating Officer. Her wide-ranging role includes strategic development, leadership of the staff team, compliance with regulatory requirements, and championing diversity and inclusion. In this interview, we discuss with Alison what her experience to date brings to Keating, and what the future looks like for Keating and the wider Bar.

What prompted you to join Keating Chambers?

I've spent my working life in professional services. I've been interested for a while in the unique business model of the Bar and how it serves clients. Keating appeals as a commercial set with a strong reputation and an international as well as a domestic focus. I value that Keating Chambers is successful, but not complacent. It is keen to continue to improve, for its clients, its members and its staff.

What are some of the challenges you have faced in getting to where you are today?

One of the challenges has been choosing where to focus when there are so many interesting opportunities. Unlike many in the world of the Bar, I haven't spent my entire career in one industry. I've had a varied journey to where I am today. I started my career in a specialist risk consultancy, working in international political and security risk analysis before making the transition into COO roles and business operations. I've also experienced a range of sectors, working in risk consultancy, start-ups, a law firm and the regulatory sector. Every organisation is different, and I love the challenge of getting to understand a new culture and how to enable each unique organisation to be at its best.

What are you interests outside of work, and how to you ensure a good work/life balance in your demanding role?

I have a number of passions, pandemics allowing. I am a big theatre fan and try to take advantage of living in London to go at least once a week. I am also passionate about food (eating out and cooking), travel and seeing exhibitions. I'm also a trustee for a London-based charity BANG Edutainment, which provides support to help vulnerable young people thrive and build sustainable communities.

I love getting to the gym, which helps keep me sane, and is particularly needed since the Keating team introduced me to Crosstown doughnuts. I'm also a trained professional coach, and endeavour to use those skills to keep balance and perspective, as well as to support my team.

What do you think the biggest challenges are for barristers' chambers over the next few years?

Different areas of the Bar face different challenges, and those facing a commercial set such as Keating are not the same as those facing criminal or family sets for example. For me, key challenges include delivering greater diversity and creating an inclusive environment so that we reflect the community we serve, and benefit from the creativity and innovation that diversity of experience and approach brings.

I am also interested in how we evolve the provision of legal services with technological and market changes. Keating has proved resilient and flexible to responding to the challenges of the last couple of years and I am excited about how we can use those skills to continue to evolve.

What have you been your priorities during your first nine months?

My first few months have been focused on building relationships and getting to know everyone, working on how to bring staff and barristers back to Chambers safely as the pandemic evolves, and addressing the increased cyber security threat that the sector has faced.

What do you think is Keating's biggest strength?

It's a cliché, but nonetheless true. Keating's biggest strength is its people, both the quality of its barristers and a dedicated staff team. It is a successful chambers with a clear raison d'etre and collegiate spirit, that is fostered by shared expertise and knowledge.

What is the current strategic focus of Keating's leadership team?

We have several specific focuses through Keating's various committees, including our Executive committee, Equality and Diversity committee, Marketing committee, and Pupillage committee, each with a unique role. But there is one clear thread that runs throughout; that is the focus on quality. And I believe that an essential part of this is diversity and inclusion - both attracting more diverse talent, and ensuring diversity can flourish at Keating. There is too much to talk about in one answer, but this ranges from a focus on outreach, encouraging those who might not consider a career at the Bar as an option to think again, to how we develop the practices of our barristers at every stage of their career.

What does diversity and inclusion mean to you, and why do you personally care about championing a culture of diversity and inclusion?

For me it means attracting, recruiting, retaining and developing the best talent regardless of background and differences, whether of gender, sex, socioeconomic background, upbringing, religion, education, sexual orientation, ethnicity, neurodiversity or life experience. And the critical part is inclusion. An organisation can only truly benefit from diversity if everyone is equally able to contribute and be valued.

I value different experiences and different voices in making Keating a more rewarding and interesting place to work. I also believe it helps us to deliver better and more innovative client service.

What are you most looking forward to at Keating in 2022?

I hope that in 2022 I can meet as many of our instructing solicitors and clients as possible in person to understand what they value most from Keating, and how our clerking and professional support teams can continue to provide the best possible assistance.

CAN YOU EXCLUDE OR LIMIT LIABILITY FOR A DELIBERATE BREACH OF CONTRACT?

By Ben Graff

Originally published in Thomson Reuters' Practical Law Blog, May 2021

The short answer to this question is yes. But matters become slightly more complicated when considering how this can be done.

In *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC), the Claimant ("MM"), an engineering contractor, brought a claim for alleged non-payment of its fees by the Defendant ("Trant") for the provision of design consultancy services in relation to the construction of a power station in the Falkland Islands. Trant raised a substantial counterclaim, alleging that MM *"had positively and deliberately refused to perform its obligations and had done so in order to put improper pressure on [Trant] to pay sums which were not due to [MM]."*

MM denied any such breaches but contended that in any event, the exclusion and limitation clauses in the parties' agreement would operate to exclude or limit its liability, irrespective of whether Trant could establish that such breaches were fundamental, wilful or deliberate. MM applied for summary judgment on this point.

The starting point

There is no rule of law preventing an exemption clause applying to a fundamental breach. This has been clear since the decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 in which the House of Lords categorically rejected the suggestion that such a rule existed. Lord Wilberforce said at 842H:

> *"I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract."*

Accordingly, in this case, the parties were agreed that the question for the Court was one of construction: whether the clauses in question, when properly construed, limited or excluded liability for fundamental breaches of contract. The parties differed however on the rules of construction that should be applied.

Construing exemption clauses

MM argued that an exemption clause is to be construed by reference to the ordinary principles of contractual construction as articulated, for example, in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

Trant submitted that special rules of construction apply to exclusion and limitation clauses and that there was a strong presumption against an exclusion clause operating to preclude liability for a deliberate repudiatory breach of contract. Trant said that this presumption could only be rebutted by strong language. It relied in this regard on the judgment of Gabriel Moss QC in *Internet Broadcasting Corporation Ltd & others v MAR LLC* [2009] EWHC 844 (CH) ("*Marhedge*") in which the Court suggested at [33] that in order for an exemption clause to apply to deliberate wrongdoing, the clause must refer to this category of breach expressly: *"[l]anguage such as 'including the deliberate repudiatory acts by [the parties to the contract] themselves…' would need to be used in such a case."*

HHJ Eyre QC rejected this analysis and found that the clauses in question applied to fundamental breaches. The judge held that Marhedge provided an inaccurate summary of the law, which risked reintroducing the rule of law previously rejected by the House of Lords in by the back door and preferred the more recent first instance decision of Flaux J in *Astrazeneca UK Ltd v Albermarle International Corporation & another* [2011] EWHC 1574 (Comm). HHJ Eyre QC stated that the law had not changed since Photo Production and could be summarised as follows:

> *"Exemption clauses including those purporting to exclude or limit liability for deliberate and repudiatory breaches are to be construed by reference to the normal principles of contractual construction without the imposition of a presumption and without requiring any particular form of words or level of language to achieve the effect of excluding liability."*

HHJ Eyre QC did not go so far as to say that an exemption clause will be construed in the same manner as any other clause. In fact, he considered the exclusion of a liability that would otherwise and ordinarily arise (such as a liability for a deliberate breach) to constitute a departure from the norm and an outcome that the court will not readily expect. For this reason, the judge held that clear words will be required to achieve this effect. He added that the limitation of a liability is less of a departure from the norm as it reflects an agreed allocation of risk. As such, the court is more likely to conclude that a limitation of liability was intended than it would a total exclusion.

Concluding thoughts

This judgment suggests that where an exemption clause is properly capable of only one meaning, then effect will be given to that meaning, irrespective of whether this means excluding or limiting liability for fundamental breaches of contract. This includes clauses (as in this case) that are deliberately drafted in broad terms so as to refer to all breaches without referring to any one kind of breach expressly.

However, where an exemption clause is at all ambiguous, there is a risk that the court will find that it does not contain the clear words required to demonstrate the unusual intention to exclude or limit liability for fundamental breaches of contract. For the reasons stated above, this risk will be more pronounced for exclusion clauses.

This analysis is subject to the important caveat that a party cannot exclude all possible liability under the contract as this would be to *"reduce [its] obligations to the level of a mere declaration of intent"*. The courts will not accept that this was what the parties intended.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

LANGAGE ENERGY PARK LTD V EP LANGAGE LTD [2022] EWHC 432 (CH)

In a judgment handed down on 4 March 2022, Fancourt J held that the Claimant's notice that there will be "demand" for certain services, served pursuant to a section 106 agreement made between the Defendant and the local planning authority (incorporated into a further agreement made as between the Claimant and the Defendant), was not valid on the basis that the Claimant did not hold honest belief in the truth of its content. In reaching this conclusion, he found that the witness evidence contained matters that were *"untrue and misleading"* and that the correspondence and witness evidence sought to give a *"false"* picture of the position.

In addition, it was implicit that in order for the notice to be valid, the Claimant had to have a reasoned basis for making the evaluation of the matters asserted in the notice; the Court upheld the Braganza-type implied term and found that the Claimant's evaluation of future demand was without adequate basis.

Justin Mort QC represented the Defendant.

ATOS SERVICES UK LTD V SECRETARY OF STATE FOR BUSINESS, ENERGY, AND INDUSTRIAL STRATEGY & ANOR [2022] EWHC 42 (TCC)

These are ongoing proceedings arising out of the Defendants' procurement of a new supercomputer for use by the Second Defendant. The Claimant was an unsuccessful tenderer in that process and alleges there were breaches of the Defendants' obligations under the Public Contract Regulations 2015.

The Claimant sought permission for expert evidence in the field of high-performance computing and identified 17 issues which it submitted should be the subject of such evidence. The Defendants successfully argued that expert evidence should only be admissible as to the explanation of technical terms; the context of the procurement; and the capacities and structures of the relevant computer systems but not as to the equivalence or otherwise between them.

Applying Coulson J's categories in BY Development & others v Covent Garden Market Authority [2012], Eyre J held that where a procurement decision was challenged on the basis of manifest error, expert evidence might be necessary to show the materiality or centrality of the error, or to enable the judge to reach a conclusion on the incontrovertibility of the error, but it would not be admissible insofar as it involved the expression of an opinion as to the existence or otherwise of a manifest error.

Further, where a procurement exercise was challenged for failure to satisfy the requirements of equal treatment, transparency and consistency, expert evidence might be admissible if it was necessary to explain technical terms, the context of the procurement exercise, or the circumstances of the industry in question, but anything involving an opinion as to the understanding of a reasonably well-informed and normally diligent tenderer would not be admissible.

The trial in this case (which was included in The Lawyer's Top 20 Cases of 2022) is listed for 9 May 2022.

Sarah Hannaford QC appeared for the Defendants.

BUILDING DESIGN PARTNERSHIP LTD V STANDARD LIFE ASSURANCE LTD [2021] EWCA Civ 1793

In this judgment, the Court of Appeal considered the viability of pleading a professional negligence claim on an extrapolated basis. Dismissing the appeal, the Court upheld the judge's refusal to strike out (or grant reverse summary judgment on) the parts of Standard Life's claim that were based on extrapolation. The Court held that, in an appropriate case and with proportionality in mind, extrapolation can be used to plead claims against a professional in relation to an unknown population of the professional's work, based on a known sample of the professional's work.

The appeal raised a novel point as to whether breaches must be alleged to be systemic in order to support inferences of negligence against a professional.

BDP argued that sampling and extrapolation were only appropriate in cases of alleged systemic failure, where what was essentially the same defect arose across a project. In giving the leading judgment, Coulson LJ rejected that distinction; there was nothing special or different about a professional negligence action that prevented an extrapolated claim being pleaded as part of such a claim.

The Court also rejected BDP's floodgates argument that allowing the pleading in this case to stand would encourage undetailed claims, stating that pleading every detail should not be regarded as the paradigm method of framing construction disputes, particularly where there are more proportionate alternatives that enable a defendant to know the case it has to meet. The details might have to be investigated in certain types of construction disputes, but that should only ever be commensurate with the overriding objective.

Jonathan Selby QC and Callum Monro Morrison represented the Respondent. Vincent Moran QC and William Webb represented the Appellant.

RHP MERCHANTS AND CONSTRUCTION LTD v TREFOREST PROPERTY COMPANY LT [2021] EWHC B40 (TCC)

In this judgment the Court balanced a number of factors of policy and law when considering whether to order a stay of a claim pursuant to CPR r. 3.1(2)(f) where:

1. The Claimant had failed to honour an adjudication decision (A1), which had been enforced, and which was substantively the same as the subsequently issued Pt 7 claim being pursued;

2. but the Claimant also had an adjudication decision (A2) in its favour, that it had not yet enforced.

The Court had to consider, first, whether to order a stay, and, if so, on what terms. That second consideration raised an interesting question as to what weight should be attached to A2 as opposed to A1. If A2 were discounted, the terms of the stay would require the Claimant to pay a much greater sum (c. £220,000 more) in order to have the stay lifted.

There is case law which covers the circumstances of the first point (*Anglo-Swiss Holdings v Packman Lucas Ltd [2009]* and that of O'Farrell J *Kew Holdings Ltd v Donald Insall Associates [2020]*) but not encompassing the second point.

The decisions in *Anglo Swiss and Kew Holdings* set out the principle that a stay may be appropriate where proceedings are issued by a claimant who has failed to comply with an adjudication decision which required it to pay the defendant. However, neither Judgment entailed consideration of (i) countervailing adjudication decisions, or (ii) whether to differentiate between enforced/unenforced adjudication decisions.

With this in mind, the Judge, Roger Stewart QC, noted that the HGCRA "pay now argue later" ethos of adjudication was something of a double-edged sword for a party seeking to rely upon it who has not itself satisfied an adjudication decision. The Judge did not accept the submission that A2 should not be considered; that was despite a concern as to the validity of that decision.

That conclusion follows from a decision in *Prater Ltd v John Sisk and Son (Holdings) Ltd [2021]*. In that decision, Veronique Buehrlen QC (sitting as a Deputy High Court Judge) treated an adjudication award as necessarily valid unless the court decides otherwise.

By analogy, therefore, the reasoning in *Prater* could be applied so that A2 was assumed valid until challenged; that was then the approach adopted by the Judge in this case.

Following those steps, the Judge ordered a stay but, importantly, it was on the basis of the difference between the respective liabilities between the Parties, which included the sums owed in A2.

As such, the decision represents a further application of the principles formulated in *Anglo-Swiss* and *Kew Holdings*, though with something of a twist: where there are countervailing adjudication decisions between the parties, a stay is ordered subject to payment of the net balance.

John Steel represented the Claimant.

MULALLEY & CO. LTD V MARTLET HOMES LTD [2022] EWCA Civ 32

On Monday 24 January 2022, the Court of Appeal upheld the decision of Pepperall J, giving the Respondent permission to amend its Particulars of Claim out of time pursuant to CPR 17.4(2) so as to include an allegation that the Appellant's use of combustible cladding material for a tower block refurbishment in 2005-2008 was in breach of its design and build contract. Although the amendment represented a new cause of action, it arose out of the same or substantially the same facts that had already been pleaded in the Particulars of Claim and put in issue by the Defence.

Jonathan Selby QC represented the Respondent. Simon Hughes QC and James Frampton represented the Appellant.

PLANNING APPEAL DECISIONS: WHITSTABLE OYSTER FISHERY COMPANY APP/J2210/C/18/3209297, APP/J2210/C/18/3209299, APP/J2210/C/18/3209300

The inquiry concerned a decision of Canterbury City Council (CCC) in 2018 regarding the need for planning permission for a new method of cultivating oysters using trestles, with CCC issuing an enforcement notice to WOFC for the removal of the trestles citing concerns relating primarily to the effect on the Swale Special Protection Area ("SPA"). CCC's position in relation to the SPA was prompted by the stance of Natural England. By the time of the enforcement notice, the farm had significantly expanded and the trestles were essential to WOFC's operations so they appealed against the notice under s.174 of the Town and Country Planning Act 1990.

Due to Natural England's ongoing concerns but their refusal to attend the inquiry, WOFC asked the Inspector (Katie Peerless) to exercise the power under s.250(2) of the Local Government Act 1972 to summons Natural England to attend the inquiry for cross-examination (a power very rarely, if ever, invoked previously). The Inspector invited Natural England to do so, and an hour before they were due to be cross-examined, Natural England withdrew their objection subject to the imposition of a condition restricting working on the oyster farm in conditions below minus 3 degrees Celsius. CC withdrew their opposition to the trestles once Natural England accepted that adverse effects on site integrity of the SPA could be ruled out. On 25 October 2021 the Inspector allowed WOFC's appeal.

Charles Banner QC represented the Appellant.

TOPPAN AND ABBEY V SIMPLY [2021] EWHC 2110 (TCC)

The Claimants sought to enforce two adjudication decisions. The issues were:

- Whether a collateral warranty executed after completion of the original works and remedial works was a construction contract for the purposes of the Housing Grants, Construction and Regeneration Act 1996.
- Whether VAT was due and awarded within jurisdiction.
- Whether interest was awarded within jurisdiction.
- Whether the Defendant was entitled to stays of execution.

The Claimant succeeded on issues 2-4. The Court granted summary judgment on one of the enforcements; but not on the other, holding that one of the collateral warranties was not a construction contract. The appeal on this case is currently ongoing.

Tom Owen represented the Claimants.

DAVID THOMAS QC

David Thomas QC, awarded Construction Silk of the Year in the 2021 Chambers UK Bar Awards, is known for his forceful advocacy, incisive cross-examination skills, commercial awareness, and the clarity and practicality of his advice. David has a busy UK construction practice, and he appears regularly in the Court of Appeal and the TCC on a range of high-profile matters, as well as in international arbitrations arising from GCC countries, Africa and Asia. He has been instructed in some of the biggest and highest profile cases in the world including the Shard, Wembley Stadium, the Olympic Stadium and the Burj Khalifa.

You were recently awarded Construction Silk of the Year at the Chambers UK Bar Awards. What advice would you give a junior barrister aspiring to this accolade in their career?

If you love your work, then success tends to come. So, I would say stand back and realise how enjoyable the work is and how lucky we are to practice in such a fantastic area of law. It is a really fun job; we get to see some fascinating projects, analyse the complex contracts that are put in place to achieve them, and learn the stories of how they were built from those involved. It's great to have such stimulating work.

What has been a career highlight for you to date?

There have been so many. I loved the big engineering projects that I have been involved in around the world as I learned, for example, how you get oil and gas out of the ground, how you build a long bridge or tunnel or a very tall building, or how solar or hydro-electric power is generated, to name just a few.

If I had to choose one, it would be my time working with the developer and project management team on the Shard in London. It was not a case that went to a hearing, but I was retained by the developer to make site visits every 6 weeks or so throughout the project, so I understood the building in case there was a big dispute at the end. On each visit I had a tour of the site, and then discussed any contractual matters that were arising at the time and provided very early legal input to help resolve issues before they became serious. It was a wonderful opportunity to actually see such an iconic building being built in real time, which is quite an unusual experience for a barrister.

What types of issues do you typically tend to see as a construction barrister?

The most common types of legal issues we see revolve around interpretation of the contract. Construction contracts tend to be lengthy and complicated, and a lot of the disputes go back to a question over what the words in the contract mean. There are also a lot of technical issues. I find myself having to learn about such things as chemical processes, computer modelling, statistics or the way concrete behaves under different stresses and strains, to name a few recent instances. It's a privilege to work with engineers and scientists in their specialist fields.

How did you find the transition from working and attending hearings in person, to a sudden shift towards virtual working and importantly, virtual hearings?

What I found more challenging than the hearings themselves was the virtual preparation. In my field of work, especially when working on large projects with a team of lawyers, clients and experts, there is sometimes no substitute for getting everyone round the same table with their sleeves rolled up, with the documents, and going on until you get to the bottom of things. That just does not work nearly so well on a Zoom call. Remote hearings are obviously not as good as in-person ones. As an advocate I want to be present with the people that I am trying to persuade. That said I think the relative formality of hearings, with everyone having their turn to speak, meant they were often less of a challenge than the preparation. Anyway, it was something that we all just got on with.

You have an extensive international practice arising from GCC countries, Africa, and Asia in particular. What do you enjoy most about having a broad, international case load?

I really enjoy travel and my international practice has given me the chance to visit countries that I may not otherwise have visited, which has been very rewarding. It is great to have the opportunity to make friends around the world and get insights into the way another country works. For the most part we are talking about up and coming, young countries. Efficient dispute resolution is a necessary ingredient in the success of these countries, and to have a role in providing that is rewarding. The projects also often bear remarkable testimony to human vision – just look at Dubai – and it is exciting to see them.

What are the key challenges facing the construction industry at present?

The first thing that comes to mind is skills shortages, and somewhat linked to that is the adoption of technology. Technology is both becoming rapidly available and rapidly changing, and I think the industry is challenged as to how to use all the new tools at its disposal. For example, how does the construction industry best use artificial intelligence, drones and robotics to improve design, efficiency, and safety. I have no doubt that those who adopt the

best technology, use it well and get it right will find themselves with a competitive advantage.

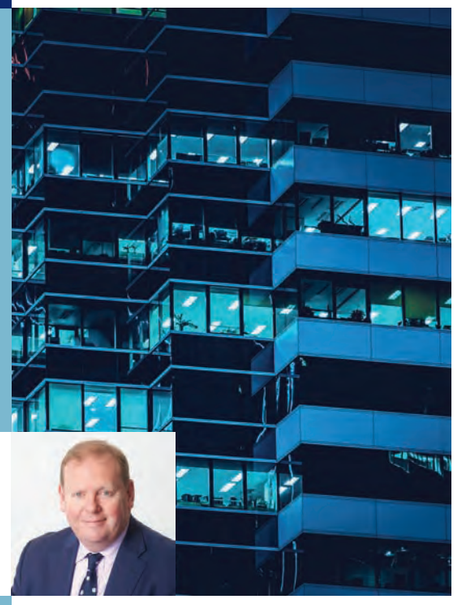
How has the role of a specialist construction barrister evolved since you were called to the Bar?

From my perspective, we are seeing more international work and more arbitration, as well as diversification of the types of cases we are involved in. When I was a very junior barrister the 'Building Bar', as it was then called, was a lot more about disputes over building buildings in the United Kingdom. Whereas now we work on cases that are about projects all over the world, and whilst some are still about the construction of buildings, we now cover so many different industries; in particular, a lot of work comes from the energy, process and infrastructure sectors. The financing has also changed, which means that we get involved in not just a single contract, but a whole suite of contracts, including the financing agreements. As a result, sometimes we find ourselves dealing with matters that are not really construction disputes at all, but more generally in the commercial sphere and tangential to the construction project itself.

Outside of the law, what are your other interests or passions?

I love tennis and gardening.

STANDARD LIFE V BDP: AN EXTRAPOLATION TOO FAR?



This important recent decision of the Court of Appeal concerned a fundamental point of principle: is it permissible for a party to plead allegations of professional negligence by way of extrapolation? In dismissing the appeal against the first instance judge's refusal to strike out the claim, it was held that such a claim was viable, and that on the facts of the case the claim was adequately pleaded.

By Vincent Moran QC

Counsel for BDP at first instance and in the Court of Appeal.

The dispute arose out of the development of a mixed-use retail and residential project at Parkway, Newbury in West Berkshire in which, at the time of contract award, the design was not sufficiently developed to be used as the basis of a tender. As a result, over 50% of the contract value was made up of provisional sums, 98.5% of which were undefined. Unsurprisingly, therefore, a large number of variations, referred to as CAIs and CVIs, were issued during the works. Some of these were instructions issuing the detailed design as it was completed by the design team. However, many were just general day-to-day instructions which did not change the works at all. Others were simply passing on client-led variations.

In its pleadings the Claimant/Respondent (Standard Life, the owner of the development) relied upon (i) a conventional claim (what the Court of Appeal described as "the Detailed Claim") for damages against the Defendant/Appellant (BDP, one of the architects for the development) for extra costs associated with 122 specific variations connected with four specific categories of work, and (ii) an unconventional claim, said to be derived from the above 122 variations (described as the "Extrapolated Claim"), for damages in respect of extra costs incurred as a result of a further 3,482 Variations (including ones arising from completely different categories of work than those connected to the Detailed Claim).

The Extrapolated Claim totalled as against BDP approximately £16.3m in direct costs ("the Extrapolated Variations Claim") and £3.7m in loss and expense ("the Extrapolated Loss and Expense Claim") and therefore made up the majority (about £20m) of the overall claim (of about £32m) then advanced against BDP. Of note is that (i) there were a total of 3,604 Variations issued on the Project, (ii) Standard Life, however, had only even looked at and analysed 156 such Variations before pleading its case, (iii) by its own admission, Standard Life had carried out no analysis at all (at any level of detail) of the remaining Variations, asserting that it would be disproportionate to expect it to do so, (iv) it had pleaded a conventional case of professional negligence (i.e. explaining what conduct was being criticised and how BDP should have acted to discharge its duties) in relation to only 122 of the 156 Variations, which it had in fact investigated, and (v) for the other Variations that had been included in the claim (i.e. the 3,482 that formed the basis of the Extrapolated Claim), *there was no variation specific pleaded case as to why BDP were alleged to have been at fault whatsoever* - there was simply a list of the relevant Extrapolated Variations appended to the Particulars of Claim.

Standard Life therefore advanced the Extrapolated Claim on the basis of *unexplained variation specific conduct* in connection with the 3,482 variations on which it was based, by reference merely to alleged pleaded defaults associated with the 122 variations that made up the Detailed Claim (which were often *connected with other totally different categories of work*), and without alleging any clear systemic breach of contract/duty to link the two parts of its claim.

The specific issue of reliance upon extrapolation to plead a construction claim (albeit in a defects case and not in a professional negligence context) had been addressed previously by the TCC in *Amey LG Limited v Cumbria County Council* [2016] EWHC 2856 (TCC). In this case the Court drew a distinction between cases involving allegations of systemic breaches extending over a wide variety of individual defects and cases which are in practice a number of individual claims for individual defects (or similar) (see paragraph 25.104). It was only the former that were considered as appropriate to claim by way of extrapolation. The use of sampling to assess the true factual extent of an already properly pleaded series of systemic breaches and/or defects is also, of course, common in TCC cases (e.g. defective welds in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC) or fire stopping defects in *Zagora Management Limited & Others v Zurich Insurance Plc & Others* [2019] EWHC 140 (TCC)).

In its appeal BDP argued, however, that the present case was very different to these cases and that the pleading of the Extrapolated Claim did not satisfy the essential requirements of a viable pleading in accordance with the CPR and the well known dicta in *Pantelli Associates Ltd v Corporate City Developments No2 Ltd* [2010] EWHC 3189 (TCC); [2011] PNLR.12. BDP's essential point was that a defendant has a right to know the case which it has to meet and there was no possible way BDP could understand the detail of its alleged negligent conduct in relation to the variations that made up the Extrapolated Claim - since no specific particulars of breach or causation in respect of them had been pleaded.

Standard Life's case was summarised at paragraph 12 of the judgment as follows:

> *In essence, Standard Life say that, in circumstances where:*
>
> - *BDP's personnel worked on all the significant aspects of the project, performing the same basic functions;*
> - *The underlying causes of the additional cost which have been investigated appear, again and again, to be the provision of late/inadequate/inaccurate/incomplete/uncoordinated information by BDP;*
> - *BDP have not provided any positive case to suggest any other cause of the additional cost. It cannot be Costain's responsibility, because otherwise BDP would not have approved the additional payments to them;*
> - *It would be disproportionate to analyse each of the remaining 3,437 variations in the same way as the 167;*
>
> *they can extrapolate their analysis of the 167 variations which make up the Detailed Claim across all the other (unexamined) variations, so as to give rise to the Extrapolated Claim. That is the inference which they ask the court to draw.*

The Court of Appeal accepted Standard Life's case and dismissed BDP's appeal by finding that the approach to the pleading was proportionate and enabled BDP to know, in general terms, the case it had to face:

> 40. *The question for this court is whether a claimant can, in effect, go back a step, and plead a claim at the outset on the basis of sampling and extrapolation. Standard Life say that it is legitimate for a claimant to plead the sample in detail, identify the links between the sample and the pool of all the allegations, and explain how and why any findings on the sample would give rise to liability for the whole or part of the pool.*
>
> ...
>
> 47. *In short, both Amey and ICI show that, as a matter of pleading, in an appropriate case, a claimant can plead an extrapolated claim. Both cases also show that at trial, such claims can be particularly difficult to establish.*
>
> ...
>
> 52. *I should also make one other thing plain at the outset. What matters is whether the Extrapolated Claim passes the relatively low hurdle raised by the CPR at r.3.4(2)(a) and (b), and r.24.2. Whether or not such a claim is more likely than not actually to succeed at trial is irrelevant. Nothing I say in this Section of the judgment should be taken as indicating any views about the likely success or failure of the Extrapolated Claim at trial. All that matters is whether it is an abuse of process, or whether it fails to disclose reasonable grounds for bringing a claim, or whether it has no real prospect of success, any of which would mean that it should be struck out now.*
>
> ...
>
> 55. *There was a dispute as to whether proportionality was a relevant consideration at the first stage of the test under r.3.4(2). I accept Mr Moran's submission that, certainly in the vast majority of cases, proportionality will only be relevant at the second stage (the exercise of discretion) and not at the first. That was a general point I made in Cable v Victoria.*
>
> 56. *But Cable v Victoria was not dealing with claims of this nature, where at least a part of the pleaded claim is put forward on an extrapolated basis because, so it is said, it would be disproportionate to require Standard Life to plead out a case on each of the remaining 3,437 variations. For the reasons explained by the judge at [127]-[129], proportionality is a real concern here. If it would be far too time-consuming and costly for Standard Life to do what they have done in schedules 1-4 for all the 3,437 variations, is proportionality a relevant consideration when considering whether the claim is an abuse of process?*
>
> 57. *It seems to me that it is. It would be artificial for the court to ignore questions of proportionality in an already heavily pleaded case like this. Moreover, that view is confirmed by the terms of the overriding objective (and its express reference to proportionality), which must apply generally to the pleading of claims. So it is necessary then*

to ask: is it proportionate and in accordance with the overriding objective for Standard Life to plead the Extrapolated Claim in this way? If it is, then provided that BDP can understand the case that they have to meet, and that case has a real as opposed to fanciful prospect of success, it cannot be said that the Extrapolated Claim falls foul of r.3.4(2) or should be struck out.

58. In my view, the Extrapolated Claim is a proportionate way of addressing the 3,437 un-investigated variations. Like any other step taken to save costs, it may make the claim more difficult to establish at trial, but that is an inherent part of the trade-off which any claimant has to negotiate, between saving costs by not doing things which, if money were no object, it might have done, and maintaining a realistic prospect of ultimate success.

...

63. For the reasons set out below, in respect of the Extrapolated Claim, I consider that BDP are fully aware of the case that they have to meet. They may not like it, and they may consider that it is likely to fail for many of the reasons they advanced to the judge and to this court, but there can be no doubt that they can understand the Extrapolated Claim and how it is advanced.

...

67. By way of the Extrapolated Claim, Standard Life therefore argue that it is a reasonable inference that these same problems (of late, inadequate, inaccurate, incomplete or uncoordinated design or over-certification) were not limited to the variations which they have investigated concerning the residential fit-out, structural steelwork, roofing and cladding. Standard Life would say: why should it when BDP had the same team working across this project, dealing with all aspects of the design? Having analysed the sample, and having returned results which they allege repeatedly demonstrate the same generic defaults on the part of BDP, Standard Life say that it is a reasonable inference that the same proportion of variations on the other elements of the work were equally the result of the same defaults.

Importantly, it was found that there was no need for Standard Life to explain why BDP are alleged to have acted negligently specifically in relation to the subject matter of the Extrapolated Claim:

69. Contrary to Mr Moran's submissions, this is not a case in which the court will consider what he called 'the apples' in schedules 1-4, and then be asked to draw an inference as to 'the oranges' which make up the remaining variations. Instead the court is being asked to draw an inference from one group of variations, which have been investigated, to another group, which have not. They are all the same CAIs and CVIs.

...

73. Mr Moran's essential point did not really engage with very much of this: it was instead much more basic. He submitted that nobody knows anything about the 3,437 variations, because they have never been investigated. Thus, he said, the Extrapolated Claim cannot be advanced by way of any analysis or evidence because there has never been any such analysis or evidence. This led him on to an unrestrained attack on the pleadings, particularly that at Appendix B, which he described as "gobbledegook". He seemed particularly upset over the use of the expression "mutatis mutandis" in that part of Standard Life's explanation of the Extrapolated Claim.

74. For the reasons that I have given, I do not agree with that analysis. But in my view, this complaint missed the point. If Standard Life are right, there would be no need to investigate those individual variations, because they are entitled to ask the court to draw the inference that 81.7% of those un-investigated variations were due to BDP's default.

Essentially, therefore, it was found that a viable inference as to the basis for the alleged liability could be drawn (for the purposes of the strike out application at least) from the Detailed Claim (based on merely 122 CAIs/CVIs) and applied to the Extrapolated Claim (consisting of a further 3,437 other CAIs/CVIs).

Exactly why this was considered viable (not least because the CAIs/CVIs included in relation to the Extrapolated Claim related to other kinds of work) was not really developed in the judgment, as the Court merely commented that "*They are all the same CAIs and CVIs...*" (see paragraph 69).

But the Court appears to have concluded that because the subject matter of the Extrapolated Claim was, in its broadest sense, the same as the Detailed Claim (i.e. the reason why various variations were instructed and BDP's responsibility for the same) there was a sufficient conceptual and factual nexus between the two elements of the claim to permit an arguable inference – at least at the pleadings stage.

It is also not entirely clear how this approach and conclusion sits easily with the Court of Appeal's prior confirmation (at paragraphs 39 and 40) of the well-known summary of the requirements of a viable pleading in a professional negligence case in *Pantelli*. Ordinarily this has been interpreted to mean that a defendant needs to know (and a claimant needs to plead) what conduct is being criticised and what the defendant ought to have done differently to discharge its duty *in relation to each allegation of negligence*. Permitting the Extrapolation Claim in principle means that all that BDP knows about how exactly it is alleged to have acted negligently in relation to the individual variations is that it is alleged that BDP provided late/inaccurate/uncoordinated design information to the same extent and value as may be established by reference to the specific (but different) varied work in the Detailed Claim. In other words, it was held that for the purposes of satisfying the requirements of a viable and sufficiently particularised professional negligence claim, it was sufficient that BDP understood merely that Standard Life intended to infer the same kind and extent of default in relation to the variations that made up the Extrapolated Claim as may be proven in a conventional way (by reference to specific expert evidence addressing specific alleged defaults tied to specific individual variations) in the Detailed Claim.

As a final point, the Court of Appeal was also not impressed with the argument that permitting such extrapolated claims would open the door to unmeritorious overinflated claims seeking to place unfair commercial pressure on defendants:

88. Mr Moran spent some time during his oral submissions, particularly his submissions in reply, warning this court that, if they did not allow his appeal, it would open the floodgates to numerous claims in which claimants avoided pleading out the detail on which they rely, but sought instead to shortcut some or most of that material by advancing claims of the kind pleaded by Standard Life here. He painted an apocalyptic picture of defendants being cheated of the right to know the case they had to meet, and of being found liable to pay damages on a basis that they never understood.

89. It goes without saying that, in line with the views expressed above, I consider that these warnings were significantly over-stated. It is trite but true that whether or not a particular claim has been properly pleaded is a question of degree, turning on the specific facts of the particular case in question. Moreover, it is quite wrong to suggest that, if this appeal is dismissed, it will somehow lead to defendants being found liable on a basis that they did not understand. I have already explained how, on the basis of this claim, BDP know precisely how the Extrapolated Claim is put and have a number of potentially strong arguments as to how and why such a claim must fail. If those arguments were ultimately unsuccessful at trial, BDP might be aggrieved, but they would not be able to say that they did not understand why they had been found liable for the Extrapolated Claim.

It will be interesting to see to what extent the Court of Appeal's decision in this case is in fact in due course relied upon in the construction claim world as a short cut to the pleading of extrapolated professional negligence claims, perhaps overinflated for commercial or tactical reasons. Given the unusual facts and pleading in the Standard Life case, however, it is considered unlikely that this decision will lead to a flood of similar claims, at least not without renewed attacks by defendants and their insurers on the viability of the related pleading. Overly ambitious claimants should perhaps take notice of the eternal truth that much, as always, will depend upon the facts of any particular case (and the content of the relevant pleading) and that in this case Standard Life's Detailed Claim (which formed the bed rock of the extrapolation exercise it contended for) was, at least, itself a significant one and based on an extremely long, detailed and conventional pleading.

STAYS OF EXECUTION IN ADJUDICATION ENFORCEMENT: WHEN ARE THE MERITS OF THE UNDERLYING CLAIM RELEVANT?

By Harriet Di Francesco

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The starting point, and usually the end point, in construction adjudication is that the court will enforce an adjudicator's decision however plainly wrong their decision was. That is, of course, unless they lacked jurisdiction to reach their decision or materially breached the rules of natural justice. That was Parliament's intention when it enacted the Construction Act 1996 and every construction lawyer is familiar with the tenet.

Predictably, one might think, there has been an ever-growing body of cases in which defendants, with no defence to enforcement, seek to stay execution under CPR 83.7(4) (formerly RSC Order 47).

This begs the question: when are the merits of the underlying claim relevant to an application to stay execution in adjudication enforcement proceedings?

Applications to stay execution

The principles that apply are well known. They were set out by Coulson J (as he then was) in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] EWHC 1086 (TCC) at [26] and then supplemented by Fraser J in *Gosvenor London Ltd v Aygun UK Ltd* [2018] EWCA Civ 2695.

Those principles are not rehearsed here; save to say that the merits of the underlying claim are not said to be a relevant factor when deciding whether to grant a stay. Neither are they expressly excluded.

Quadro Services Ltd v FP McCann Ltd

In *Quadro Services Ltd v FP McCann Ltd* [2021] EWHC 1490 (TCC), the court grappled with the question head-on. In that case, the claimant had been awarded £1.6 million by way of damages by the adjudicator (nearly 25% of the contract value) for repudiatory breach of contract arising out of the defendant's early termination. The adjudicator had also concluded, somewhat conversely, that the same contract included an express term conferring a right on the part of the defendant to terminate for convenience.

The defendant was aggrieved by this outcome and commenced Part 7 proceedings to reverse the decision.

On enforcement, the defendant rightly accepted that judgment should be entered for the claimant, there being no apparent basis for challenging the validity of the adjudicator's decision. Instead, the defendant sought a stay of execution pending the outcome of the Part 7 proceedings. In support of that application, it appears to have made two principal submissions:

- The adjudicator's decision was likely to be reversed in the pending Part 7 proceedings.
- It was probable that the claimant would be unable to repay the judgment sum if ordered to do so at the end of the substantive trial.

As to the first submission, the defendant suggested that the merits of the underlying claim were a relevant factor in the exercise of the court's discretion to grant a stay. The more likely the decision is to be reversed, the more expedient it is to grant a stay.

Reliance was placed on [76] of Coulson J's judgment in *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd* [2018] EWHC 177 (TCC), in which he said:

"In my view, the court is entitled to consider that there is a bona fide challenge to the result of the first adjudication, and therefore the whole premise of the decision in the second adjudication. That cannot of course prevent summary judgment to enforce the adjudicator's decision, but it is a relevant factor when considering a stay."

Veronique Buehrlen QC, sitting as a deputy High Court judge, accepted that it may be relevant for the court to note whether a challenge to the result of the adjudication is bona fide. She went on to say:

"However, that is not the same as submitting that the merits of the underlying claim are a relevant factor when deciding whether or not to grant a stay. There is certainly, as far as I am aware, no authority to support a general proposition that the merits of the underlying claim are a relevant factor when deciding whether or not to grant a stay in the context of adjudication enforcement."

Indeed, the authorities suggest the opposite. To take the merits into account as part of all the circumstances when deciding whether or not to grant a stay would be contrary to the purpose of the Construction Act 1996 (see Fraser J's judgment in *Trident Maintain Ltd v Falcon Investments* [2016] EWHC 3895 (TCC), Fraser J at [29]).

Although a stay had been granted in *Equitix*, it was decided on very different facts. By the time of the enforcement hearing, the claimant was "an SPV with no P" with no possible incentive to remain in existence for a minute longer than it needed to. Thus, if the defendant was ordered to pay the judgment sum (a hefty £10 million), the risk of it having overpaid and never being repaid was very real. The case was, in Coulson J's own words, "unusual" (see [71]).

Conclusion

As to the question: when are the merits of the underlying claim relevant to an application to stay execution in adjudication enforcement proceedings? The answer is seldom, if ever.

The appropriate guidance remains *Wimbledon v Vago and Gosvenor London v Aygun* and the cases that have followed.

That guidance includes the following principles which the judge in Quadro Services relied upon in her judgment:

- The evidential burden lies with the party applying for the stay and the burden is high.
- The party seeking the stay is not entitled to embark on a fishing expedition and demand access to confidential commercial information from the respondent.
- The question that the court must ask is not as to the financial position now or in the past of the company but when any final determination is likely to be made and any sum repaid.
- The exercise of the court's discretion is a balancing exercise. If the financial information made available by the claimant is unsatisfactory, that may lead to a refusal to enforce the adjudication decisions.

The defendant was unable to meet the evidential burden and thus, notwithstanding serious questions about the merits of the adjudicator's decision, its application for a stay of execution was dismissed.

LIQUIDATED DAMAGES AND LONDON BUSES

CASES ABOUT LIQUIDATED DAMAGES ARE, IT TRANSPIRES, LIKE LONDON BUSES: YOU WAIT AGES FOR ONE TO TURN UP AND THEN TWO COME ALONG TOGETHER.

By Tom Coulson

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In the summer of 2021, barely two weeks after the Supreme Court decision in *Triple Point* restored good sense to the law concerning the recoverability of liquidated damages after termination,[1] O'Farrell J handed down a judgment which dealt with two of the other classic debates in the law relating to liquidated damages. Her decision in *Eco World – Ballymore Embassy Gardens v Dobler* deals first with the law concerning the application of the penalty doctrine to the liquidated damages clause where partial possession has been taken, and secondly, with the debate about whether such a clause operates to limit the contractor's liability for losses resulting from delay even where it has found to be void and inoperable.[2]

Background – Eco World - Ballymore v Dobler

The dispute arose out of a contract by which the Claimant developer engaged the Defendant contractor to design, supply and install façade and glazing works for a building forming part of a development in Nine Elms, London.

The contract was on the JCT 2011 Construction Management Trade Contract form, subject to a number of bespoke amendments. It included a liquidated damages clause by which the Contractor was to pay liquidated damages at a rate of £25,000 per week up to an aggregate maximum of 7% of the final contract sum. It also included a clause by which the Employer was empowered to take over part of the Works prior to practical completion. However, it did not contain a mechanism to reduce the level of liquidated damages that would be paid in those circumstances.

The dispute came before the Court in Part 8 proceedings in which, somewhat unusually, it was the Employer that was seeking to argue that the liquidated damages clause was unenforceable as a penalty, whereas the Contractor was seeking to uphold it.

The parties had previously fought a series of adjudications which had led them to adopt what might otherwise have appeared to be those counterintuitive positions, both parties having *"performed a volte-face"*, as the Judge observed, each arguing the case put forward by the other in the adjudication.[3]

1 *Triple Point Technology Inc v PTT Public Co Ltd* [2021] A.C. 1148.

2 *Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC); 197 Con. L.R. 108.

3 *Eco World*, para. [48].

Issue 1 – Partial possession and the penalty doctrine

The Claimant's argument was that where an Employer under a construction contract exercises a contractual right to take early partial possession, but the liquidated damages provisions do not contain a mechanism for reducing the sums to be paid to reflect such early possession, the liquidated provisions are void and/or unenforceable. In advancing that argument it relied on some old favourites in terms of authorities – *Bramall & Ogden v Sheffield City Council* and *Taylor Woodrow v Barnes & Elliott* – as well as on supportive passages in both *Keating* and *Hudson*.[4]

O'Farrell J rejected that argument. Having conducted a careful review of the authorities, she pointed out that they did not reject as automatically fatal the concept of one rate of liquidated damages applying even where there was sectional completion or partial possession.

The Judge acknowledged that one of Lord Dunedin's well-known propositions in *Dunlop Pneumatic Tyre Co* was that there was a presumption that a provision was penal where a single sum was made payable on the occurrence of several different events, some of which might occasion serious and others but trifling damage.[5] However, she held that applying the test for a penalty identified by the Supreme Court in *Cavendish Square*, the liquidated damages provision was not unconscionable or extravagant so as to amount to a penalty.[6]

Four points were of particular importance in arriving at that conclusion. First, the liquidated damages clause had been negotiated by the parties' external lawyers. Secondly, the Employer had a *"legitimate interest"* (in the language of *Cavendish Square*) in enforcing the Contractor's obligation to complete the whole of the works by the completion date, notwithstanding the fact that it had taken partial possession. Thirdly, the quantification of damages that the Employer would suffer would be difficult, a difficulty avoided by the agreement of a global liquidated damages rate in advance. Fourthly, the level of liquidated damages at £25,000 per week and subject to a maximum of 7% of the contract sum was not at an unreasonable or disproportionate level in any event.

4 *Bramall & Ogden Ltd v Sheffield City Council* (1986) 29 B.L.R. 73; *Taylor Woodrow Holdings Ltd Barnes & Elliott Ltd* [2004] EWHC 3319 (TCC).

5 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79.

6 *Makdessi v Cavendish Square Holdings BV* [2016] A.C. 1172.

Issue 2 – A cap on the Contractor's liability in general damages

Having rejected the Employer's case it was strictly unnecessary for the Court to go on to consider the Contractor's alternative argument to the effect that even if the liquidated damages clause was found to be void and unenforceable, it nevertheless operated as a cap on the general damages which the Employer could recover where it was seeking to prove the actual loss it had suffered as a result of the failure to complete on time.

As readers will be aware, this is another classic debate in the law relating to liquidated damages on which there is no modern English authority. Whilst both *Keating*[7] and *Hudson*[8] have long suggested that it would be inequitable for the Contractor to lose the benefit of the cap that it had negotiated and agreed in circumstances in which the clause is found to be penal, *McGregor on Damages* has always taken the opposite view.[9]

Whilst recognising that each case would fall to be determined on the basis of the proper construction of the relevant provisions, O'Farrell J concluded that it was the clear intention of the parties that the liquidated damages clause was to serve two purposes: first, to provide for automatic liability in a liquated sum, but secondly to limit the Contractor's overall liability for late completion. Accordingly, she concluded that if the liquidated damages clause had been void or unenforceable, the Contractor's liability for delay in general damages would still have been capped at the agreed rate and percentage.

Discussion

There is no doubting the importance of the decision in *Eco World*. The two issues which it considers are ones that practitioners will recognise as arising frequently, both in international arbitration and in adjudication.

O'Farrell J's decision on the first issue is likely to make it much harder for parties (usually Contractors) to succeed with *Bramall & Ogden* type arguments. Winning a penalty argument is always difficult but a failure to account for sectional completion or partial possession was one area in which those sorts of arguments could gain some traction. This decision changes the landscape. Indeed, O'Farrell J's approach has already been followed and applied in another case in the TCC in which a Contractor's attempt to rely on the reasoning in *Bramall & Ogden* to establish that a liquidated damages provision was penal.[10]

More generally, the decision shows that the Supreme Court's 2016 decision in *Cavendish Square* which recast the law on the penalty doctrine is having an impact on the outcome of disputes. There is certainly a case to be made that the decision would have been different under the old law with its overriding focus on whether the liquidated damages constituted a genuine pre-estimate of loss. A conclusion that the Employer nevertheless had a legitimate interest in enforcing the Contractor's primary obligation to complete the whole of the works was central to the Court's reasoning.

In that sense, the judgment can be read as exemplifying the gradual but decisive shift which has taken place in judicial attitudes towards liquidated damages clauses over the longue durée of the modern law of contract. What was once a palpable suspicion of liquidated damages clauses has given way to an approach that is entirely comfortable with, even supportive of, provisions of that sort.

It might be said that O'Farrell J's conclusions on the second issue will prove less significant, particularly as she was at pains to base her reasoning on the particular wording before her and given the difficulty of establishing that a clause is penal in the first place. However, it is suggested that the points made by the Court in reaching the decision here are of much more general application and could be made in most cases in which the issue arises. Given the longstanding disagreement between the textbooks, it is useful to have a modern authority which comes down firmly on one side.

Of the two judgments handed down weeks apart in the summer of 2021, the decision in *Triple Point* received far more attention. In one sense, that was unsurprising: it was a decision of the Supreme Court overturning a Court of Appeal decision which had been widely criticised by commentators and was giving rise to practical difficulties for parties wishing to terminate projects in substantial delay. However, it may well be that it is the decision in *Eco World* that ends up proving more significant and being more often relied on. *Triple Point* merely identified the correct approach as that which had been stated as such in *Keating* since its earliest editions. By contrast, *Eco World* provides answers to two of the other classic debates in the law on liquidated damages provisions.

7 *Keating on Construction Contracts* (11th ed.), para. 10-029.

8 *Hudson on Building and Engineering Contracts* (14th ed.), para 6-050.

9 *McGregor on Damages* (21st ed.), para 16-029.

10 *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2972 (TCC), paras. [92]-[98] (Eyre J).

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