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.