KEATING CHAMBERS ANNUAL ENERGY SEMINAR 2022

Keating Chambers held its annual Energy Seminar as a hybrid event on 27 April 2022. Our panel of speakers, Sean Wilken KC, Veronique Buehrlen KC, Krista Lee KC and Lucy Garrett KC discussed:

1		**Shell and the green energy transition**
2		**Offshore wind cases, current trends and what the future holds**
3		**Wind farms, solar farms, extraordinary technology and the professional standard of the *"ordinary skilled man"***
4		**Multi-tier dispute resolution clauses: pre-conditions to arbitration**

Key takeaways

1 Sean Wilken KC began by saying that the courts have accepted that man-made climate change is occurring and is being caused by greenhouse gases (GHGs). This therefore raises the question, both in terms of law and geopolitics, whether or not major companies will be subject to forced greenwashing. There has also been a recent surge in international climate change litigation, with courts ordering states and private companies to cap their emissions as seen in *Urgenda v State of the Netherlands and Millieudefensie v Royal Dutch Shell Plc. Millieudefensie* is particularly significant as the court fused the tortious standard of care into the European Convention on Human Rights (ECHR) to find that Shell had a duty to prevent the emission of GHGs. In *VZW Klimaatzaak v Kingdom of Belgium*, the court moved beyond mere caps in ordering the Belgian state to mitigate the emission of GHGs. Although pressure group litigation is unlikely to pick up in England and Wales as observed recently in *R (Plan B Earth) v The PM & Ors* [2021] EWHC 3469, international arbitration might be a more expansive area for these types of claims. Sean concluded with three key questions worth considering:

1) What should companies do about GHG emissions up and down the supply chain (i.e., how do they make provision for it)?

2) What should companies do about the sudden interruption of a contract by GHG regulations?

3) Commercially, who bears the cost when particular GHG claims/liabilities/taxation come home to roost?

2 On offshore wind farms, Veronique Buehrlen KC discussed *Fluor Ltd v Shanghai Zhenhua Heavy Industries Ltd* [2016] EWHC 2062 (TCC) (liability); [2018] EWHC 1 (TCC) (quantum) and *Gwynt Y Môr OFTO PLC v Gwynt Y Môr Offshore Wind Farm Ltd* [2020] EWHC 850 (Comm) to illustrate the complexity of the disputes involved in this area and how the courts approach the exercise of contractual interpretation in deciding these cases. She also discussed current trends including delays to projects caused by the impact of COVID-19 and the effect of the war in Ukraine on supply chains; employers are interested in mitigation measures that contractors are taking to minimise disruption. The current capacity is approximately 10.5GW of offshore wind with 4 to 5GW in the construction pipeline. Looking ahead, the government's recent announcement of a new target of 50GW by 2050 (with 5GW floating) in its April 2022 energy security strategy paper means we need to continue thinking about transitioning knowledge and skills from traditional oil and gas projects to renewables and the speed of this change will likely increase significantly. We will also see new entrants into the market with wind as a major source of energy being developed in Europe and Asia. One interesting issue will be the extent to which technology developed in the UK will apply in other subsea environments. Veronique concluded by saying that the planned boom in developing wind as a main energy source will provide fertile ground for offshore construction disputes.

3 Krista Lee KC discussed the designer's duty of skill and care in the context of wind and solar farms. She discussed floating wind farms and how advancements in wind turbine technology means there are no standards for testing. The contractual duty in NEC4 requires the designer to use *"the skill and care normally used by professionals designing works similar to the works"*. Applying this duty to the context of wind farms, two questions emerge: 1) who are the designing professionals? and 2) what does it mean to apply a standard that refers to works similar to the works, when it is the first of its kind? In relation to solar power, similar issues with new technology arise. Additionally, the issue of snail trails raises the question of what is a defect; snail trails are a visual defect but do they affect the performance of solar panels? *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] EWHC 895 (Comm) concerned defects on transformers and is an interesting judgment in terms of blight as one might think defects such as snail trails or cracks in welds would affect the value of the energy system because the system looks defective or has had a history of remedial works. Krista concluded by saying that the ordinary standard of skill and care, contractual or tortious, is not fit for purpose in terms of the new technologies in the energy sector, and parties therefore need to take greater care over contractual obligations.

4 Lucy Garrett KC discussed multi-tier dispute resolution clauses. In the context of court proceedings, she discussed *Cable & Wireless Plc v IBM* [2002] EWHC 2059 (Comm) and the four principles on condition precedents set out in *Ohpen Operations UK Limited v Invesco Fund Managers Limited* [2019] EWHC 2246 (TCC). In the arbitration context, she discussed: *Tang v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), *Sierra Leone v SL Mining* [2021] EWHC 286 (Comm) and *NWA, FSY v NVF, RWX, KLB* [2021] EWHC 2666 (Comm). In *Sierra Leone*, the court made the distinction between issues of jurisdiction which go to the existence or otherwise of a tribunal's power to judge the merits of a dispute, and issues of admissibility which go to whether the tribunal will exercise that power. The court in *NWA* applied *Sierra Leone* and at para 53, made reference to a test proposed by Professor Paulsson in classifying objections: *"is the objecting party taking aim at the tribunal or at the claim"?* Lucy concluded by saying that the commercial purpose of multi-tier dispute resolution clauses is not to set a new limitation period or prevent a party from issuing a claim form, but to enable parties to strike a deal before spending significant litigation costs. It will be interesting to see whether the court takes this approach in *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Limited* [2022].