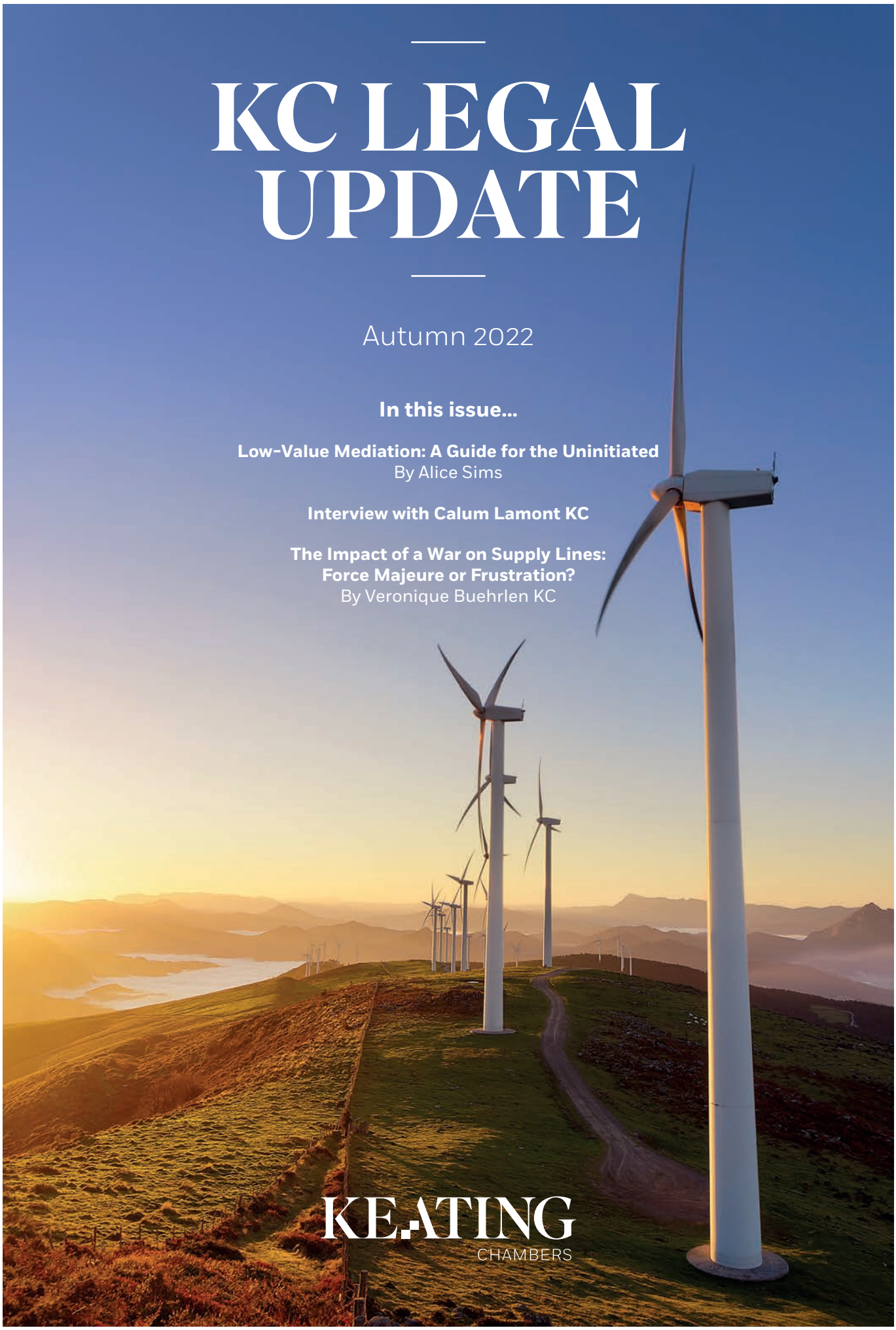
# KC LEGAL UPDATE

Autumn 2022

**In this issue...**





KEATING
CHAMBERS

# WELCOME

## to the Autumn 2022 edition of KC LEGAL UPDATE

**Since the last edition of KC Legal Update, we have been lucky enough to recommence our in-person events programme and have welcomed the opportunities to see clients, colleagues and friends. Our events programme included Keating Chambers' Annual Energy Seminar; for those who missed it, you can find a summary of key takeaways at Page 16 & 17. We were also delighted to be shortlisted for a number of Legal 500 awards, this year including staff nominations alongside the barrister categories. Ahead of the awards ceremony in October, Veronique Buehrlen KC reflected on her nomination as Arbitrator of the Year in a Q&A on Page 15. The rest of this issue covers key industry updates across arbitration, construction, energy, mediation and professional negligence.**

In other news, the first half of the year has seen the publication of two books; the second edition of *Keating on NEC* (edited by David Thomas KC and Krista Lee KC and contributed to by various members of Chambers) and a new text by our international member Robert Fenwick Elliott, *Extra-Contractual Recoveries for Construction and Engineering Work*. We would also like to congratulate Simon Hargreaves KC for his appointment as Chair of TECBAR, Amy Barrie for her promotion to Practice Manager and Oliver Goldsmith for his appointments to The Bar Council's Services Appointment Panel and ADR Panel.

We remain heavily invested in nurturing new talent and providing outreach opportunities across a range of channels. In June we were fortunate to co-host a Summer School with Lamb Building; the collaboration of a common law set with family and criminal law specialisms enabled Keating to reach a wide range of students who might not have otherwise considered coming to the Commercial Bar. Then in July we were delighted to be joined in Chambers by Anaya Price for her week-long internship. Anaya is the first intern to join us following our partnership with the 10,000 Black Interns Programme. We wish her all the best with her studies at Bristol University and in her future career. Most recently, we are thrilled to announce our sponsorship of a social mobility scholarship with Gray's Inn , aimed at supporting a Bar Student from an underrepresented group at the Bar, who may not otherwise have been able to embark on a journey to the Bar.

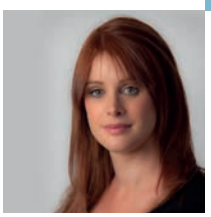
This month we were pleased to announce that Rhodri Williams KC joined Keating Chambers with effect from 10 October 2022. Looking ahead to the rest of the year, we are delighted that both our 20201/22 pupils, Isobel Kamber and Thomas Walker, accepted offers of tenancy. They commenced practice as members of Keating Chambers in September 2022. In their place, we are delighted to welcome our three new pupils for 2022/23, Mercy Milgo, Lars Gladhaug and Adam Walton, along with some new members of the clerking team following a period of growth and restructuring.

October 2022 will see Keating staff and barristers come together to showcase their non-legal skills in two competitions. First, our band, Demolition, returns to *LawRocks!*, a battle of the bands style competition raising money for music education for underprivileged children. Second, we have launched the inaugural London Pulse and Keating Chambers Corporate Cup, a netball tournament taking place at the Copperbox and raising funds for Pulse's community programme to attract, develop and support diverse new netball talent in London. You can find out more about the competition and our longstanding partnership with London Pulse by listening to our new episode on "Keating Chambers: The Podcast". Both these initiatives form an important part of Keating Chambers' CSR programme, and we are very excited to take part.

Readers might notice that in this edition, as well as across future communications and messages from Chambers, we will refer to our silks as King's Counsel (KCs). This change follows the sad news of the death of Her Majesty Queen Elizabeth II. Following legal tradition, upon the passing of the Queen and welcoming in of a new King, all silks in Chambers become King's Counsel (KCs) with immediate effect.

# CONTENTS

# LOW-VALUE MEDIATION: A GUIDE FOR THE UNINITIATED



By Alice Sims

**As well as her work as counsel, Alice Sims is an experienced mediator and ADR practitioner who specialises in construction and engineering disputes along with professional negligence, regulatory and insurance claims related to these sectors. She is applauded for her patient, non-confrontational yet firm and decisive approach and is able to draw on her extensive judicial experience when acting as a mediator. She has an excellent track-record of successfully settling disputes.**

## What is a low-value mediation?

A number of organisations, including CEDR and the Civil Mediation Council, run fixed fee mediation schemes for disputes of low-value. At Keating Chambers, the fixed fee scheme applies to any claims and counterclaims collectively valued at £600k or less. This can be a cost-effective way of mediating smaller disputes by a qualified and experienced mediator.

## What are the benefits of mediating low-value disputes?

Parties to disputes of all shapes and sizes have come to realise the benefits of mediating their disputes but there are a number of reasons why mediating a low-value dispute can be so advantageous:

- The early resolution of a dispute can be a huge relief, with savings being made in management time and productivity. This is particularly the case for smaller organisations or individuals who may be spending a disproportionate amount of their time and "head-space" on a low-value dispute;
- Low-value construction claims, due to their technical complexity, are often not dissimilar in terms of litigation costs to disputes of significantly greater value. Engaging with a specialist construction mediator can put an end to these costs at an early stage;
- As with all mediations, the opportunity, if appropriate, to settle without an admission of liability or to give and receive apologies can be a great benefit;
- The ability to pro-actively shape and control the settlement agreement rather than having a decision imposed by an external third party (such as a Judge or adjudicator) makes mediating attractive for a number of clients;
- A successful mediation can preserve or cement business relationships and the parties can include compromise provisions not obtainable in other forms of dispute resolution such as ongoing trade agreements;
- Even low-value disputes, particularly in the construction arena, frequently involve multiple parties and an adept mediator can work with multiple participants to achieve an overall settlement package;
- The confidential and without prejudice nature of mediation is, of course, one of its fundamental features and this applies equally to low-value disputes;
- Mediation can be incredibly flexible and can be used in conjunction with other forms of dispute resolution or even to resolve certain aspects of a larger and more financially significant dispute.

## Are there any tips for successful low-value mediations?

Here are my top tips for a successful low-value mediation:

- **Prepare the client:** I always encourage the client to attend the pre-mediation online meeting along with their solicitor. This is especially important if the client hasn't mediated before because, during this call, we will discuss the nature of mediation, the structure of the day and the nature of the client's expectations. Trust between a client and a mediator is paramount and I will use this call to start to build rapport and a sense of confidence in the process.
- **Inform the mediator:** It is not uncommon for a relationship between a solicitor and a client to be slightly strained or for the solicitor to have concerns about the client's realistic expectations. The more that I am aware of issues such as these, then the more nuanced I can be in my approach to facilitating a settlement. Send me a confidential email or ask for a 5-minute phone-call (separate to the mediation pre-call with the client).
- **Mediate at the right time:** All mediations work best if the case for and against each party is reasonably well developed. The parties are very unlikely to settle if the claim is lacking detail or is vague. That doesn't necessarily mean that a mediation should only take place after pleadings have closed, but it does mean that there needs to be a comprehensive letter of claim and response (or similar) for a mediation to work most effectively. This is the case even in a low-value construction mediation because the issues are rarely straightforward.
- **Make the best use of your position paper:** A position paper which repeats or recites the pleadings at length is usually a waste of time. A short summary of the key issues between the parties, followed by a punchy list of the strengths of your client's case, finishing with a paragraph about expectations and a commitment to the process is usually all that is required and is a cost-effective way of making a strong first impression in a low-value dispute.
- **Participate in a joint opening:** In my experience there can be a misconception that a joint opening meeting is unnecessary and wastes time. I am alive to those concerns and will always,

if appropriate, keep an opening joint session to a minimum in terms of time. However, an initial joint meeting is an opportunity for the parties to briefly meet each-other and a cordial welcome is often a great start to a process that has not infrequently been previously characterised by ill-feeling between the parties. I also use the joint session to remind the parties that the day is a collaborative process where we're all working together to achieve a settlement, as well as explaining that it's likely to be hard work with some expected low-points throughout the day.

- **Set the right tone with an opening speech:** An overly aggressive or hostile opening is unlikely to have a positive impact on the mediation process. Deliver a speech which is firm, succinct, and clear as to your client's expectations but is also cordial and delivered in a collaborative tone. Remember that you are trying to persuade the other side to settle on terms advantageous to your client and being overly-aggressive can be counter-productive to this. Consider also who will deliver the speech. This can be done by multiple people if desired and, in my experience, a few words from the client can often have great impact.
- **Give your client realistic advice about costs:** I will always ask each solicitor to come armed with a figure for their costs to date and their anticipated costs to trial. The costs can often dwarf the damages in issue in a low-value mediation. At some point during the day, I will start to have a confidential conversation with each party in private session about the realistic prospect of any costs award ordered by the Court (or similar). It is far better if the Client is already aware of how the costs regime is likely to work if they were to proceed to trial, for example, and also the fact that they are unlikely to be awarded all of their costs even if they are the successful party at the end of a trial.
- **Be flexible:** Mediations have the least chance of success where, early on in the day, one client declares that "X" is their final offer and that "enough is enough". I will always try to dissuade a client from making an offer on those terms: what if the other side offered £100 less than "X" for example, surely, you'd accept it? Try to lead your client away from such rigid thinking and work with the mediator to help the client avoid any unnecessary posturing and recognise the broad benefits that a settlement to the dispute would bring.
- **Have a settlement agreement prepared:** Low value disputes often don't warrant an agreement in principle on the day followed by a lengthy drawn-out negotiation process about the exact terms of a settlement. Using the mediation to resolve any wrinkles or areas of disagreement in a settlement agreement is the most cost-effective use of time, but this is only likely to be possible if the structure of a settlement agreement has been drafted in advance.

## Keating Chambers' Fixed Fee Mediation Packages

**Keating Chambers operates four packages depending upon the total value of the claim and counterclaim:**

- **Package 1 (under £75k): ½ day mediation: £500 per party**
- **Package 1 (under £75k): full day mediation: £1000 per party**
- **Package 2 (£75k to £200k): ½ day mediation: £1000 per party**
- **Package 2 (£75k to £200k): full day mediation: £1500 per party**
- **Package 3 (£200k to £400k): ½ day mediation: £1500 per party**
- **Package 3 (£200k to £400k): full day mediation: £2000 per party**
- **Package 4 (£400k to £600K): ½ day mediation: £2000 per party**
- **Package 4 (£400k to £600k): full day mediation: £2500 per party**

**A considerable advantage of mediating at Keating Chambers is that the fixed fee mediation package includes all of the necessary mediation rooms as well as a pre-mediation online meeting between the mediator and each party.**

**The current success rate of the Keating Chambers fixed fee mediation scheme is 93.5%.**

**Please contact our ADR Clerk, Oliver Goldsmith, if you would like to discuss the ways in which Keating Chambers' mediators may be able to assist you or your organisation.**

INTERVIEW WITH

# CALUM LAMONT KC

## You took silk in March 2022, can you tell us a little bit about your career and your journey to silk?

After flirting unsuccessfully with selling premium cosmetics I came to the Bar in 2004 and have been at Keating for the entirety of my career. I've increasingly gravitated towards arbitration work and pretty much all of my instructions are now in relation to international disputes. Being willing to spend long periods in the Gulf certainly assisted in building that element of my practice, and I would implore other juniors to do so if they covet that kind of work. I suppose taking silk had been on the radar for a while, but it's really difficult in our line of work to get a run of substantial cases in order to put together a credible application. As those reading will doubtless appreciate, when lockdown hit, everything went crazy. I suddenly had 6 contested hearings in a row. All of them fought. It felt like it was time, and happily I was selected. It is quite a humbling process, but aside from getting married, and finding a red-eyed vireo on Scilly in 2019, it's probably the best thing that has ever happened to me. I am enormously grateful to those who vouched for me and I would like to make a difference now I have been made up. I feel passionately about access to justice and sit on the steering committee of probonoskills.com, which provides students involved in law clinics with practical education to represent those who would otherwise go unheard. Please do get involved.

## What is the most interesting project you have worked on to date?

There have been many, but the ones that stand out are always those which involve complicated processes that have gone wrong, with conflicting explanations as to why that might have occurred. I was once instructed by a confectionary company whose "licking" machines were not applying the correct amount of chocolate onto its sweets. The bespoke German-built machinery could not keep pace with the rest of the production line. What was to blame? The consistency of the liquorice, or a system which had not been correctly calibrated? It settled. They tend to. But sometimes they don't and when that happens, the process of getting on top of technical engineering matters is, in my view, the most fulfilling aspect in our line of work.

## You are consistently praised by clients for your excellent cross-examination skills. In your experience what skills are required for an effective cross examination? Is there a particularly memorable moment from your experience in court that you can tell us about?

Well that's quite easy. Preparation. You have to be completely on top of the subject matter and the documentary material. Effective assistance from lay witnesses and experts is key to the process. Increasingly there is a tendency for clients to ask for sight of cross-examination material ahead of the hearing. Some Counsel instinctively spike at such requests, but I have always found it quite useful to share ideas with those instructing me ahead of actually asking the questions. I think barristers could do with being a bit more open-minded about that kind of thing.
I would not say that effective cross-examination necessarily gives rise to memorable moments, as the best bits are when witnesses make concessions that they are not aware they are making.
But I do specifically recall an occasion last year when an independent certifying engineer had to accept in terms that he had not been independent. I was quite surprised by that obviously damaging admission, and I have never sat down so quickly in my life, and was rewarded with extra Wagon Wheels from the IAC fridge.

## As part of the pupillage committee at Keating Chambers, what advice would you give to anyone who would like to become a commercial barrister?

It goes without saying that candidates need to be able to demonstrate intellectual rigour; without question, succeeding in examinations remains critical to success in what will always be a competitive process. However, those who are offered places to train at Keating are those who are able to demonstrate (i) a true aptitude for chambers' work, and (ii) interpersonal skills that will stand them in good stead in forging relationships with other members of chambers, solicitors, and clients. I'm always a bit surprised by applicants who are unable to articulate why they want to do the kind of work that we do. It is specialised, and it is not for everyone. But those who have thought hard about it and persuaded themselves that it is genuinely of interest to them are always the most impressive at interview. So, work hard, do the best you can academically, and focus in particular on why the practice area interests you. And never, ever, give up.

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

The job has changed tremendously over the years. Juniors now can expect to be ploughed straight into large international arbitrations, which now account for around 50% of chambers' workload, an enormous increase from when I started. There tends to be an increasing expectation from clients that barristers will need to roll their sleeves up and get stuck into the detail, as opposed to merely delivering overall strategic direction, or advice on points of law. I've always thought that the job is at least 90% hard work. There is genuinely no role nowadays for those in ivory towers. It is a much more immersive job than it used to be. That makes it all the more rewarding.

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

I'm a keen ornithologist and a member of the UK400 club (look it up). I have a petulant relationship with chambers' rock band, Demolition. Nobody practices and it drives me mad, but somehow it all comes together on the night. Come and see us in October 2022 at Law Rocks, taking place at the 100 Club.

# THE OBLIGATION TO PAY A NOTIFIED SUM WHERE THE CONTRACTOR IS INSOLVENT

By Thomas Saunders

The general rule created by section 111 of the Housing Grants, Construction and Regeneration Act 1996 is well known: the notified sum, in the absence of a pay less notice, is to be paid without set-off or deduction.

Although this is capable of causing problems for an employer in the short term, any overpayments can usually be corrected in future payment cycles (whether interim or final) or by a true value adjudication (following *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448, [2019] Bus LR 1847).

But what about when the contractor is or becomes insolvent? The concern for an employer here is obvious: money paid over to an insolvent contractor is liable to disappear into the general fund and be distributed at pennies on the pound, leaving the employer unable to recover the full value of any overpayment or cross-claims. There may not be any future payment cycles, and even if there are such cycles or a true value adjudication, it may be impossible to make a full recovery. Unlike the normal scenario, it will not simply come out in the wash.

What, therefore, can an employer do?

## Giving a pay less notice.

The first solution is the obvious one: to be scrupulous about giving pay less notices in respect of any cross-claim, or if there are any other grounds to resist payment.

However, it may not always be possible to give a timely pay less notice – suppose the facts which would entitle the employer to do so do not arise until after the deadline (or arise before the deadline but do not come to the employer's attention until afterwards).

In any case, in practical terms, it is not unheard of for an employer simply to fail to put in a pay less notice, or to miscalculate the period for doing so, through inadvertence or otherwise.

While taking care over payment notice and pay less notices is the first and most important step, therefore, it is necessary to consider what comes next.

## Section 111(10) of the HGCRA.

Section 111(10) of the Act provides that the obligation to pay the notified sum does not apply if:

(a) The contract provides that if the contractor becomes insolvent, no sum need be paid in respect of the payment; and

(b) The contractor has become insolvent after the last date for giving a pay less notice.

That provision is not comprehensive. In particular:

- It will not assist where the contractor's insolvency precedes the last date for giving a pay less notice. The rationale appears to be that an employer in that situation can protect its position by giving a pay less notice. As suggested above, this may not always be the case.

- It will also not assist in any scenario where the contract does not contain a provision of the sort set out at (a) above. This is less likely to be an issue in contracts concluded on standard forms, but may be an issue in informal contracts. No such provision will be implied by Part II of the Scheme for Construction Contracts.

See further ***Practice Note: Payment in construction contracts: Construction Act 1996, section Insolvency and section 111: Scope of section 111(10) considered.***

Even if section 111(10) is inapplicable, however, that is not necessarily the end of the matter for an employer facing a notified sum claim from an insolvent contractor.

## Resisting enforcement.

The next option is to resist enforcement of any adjudication decision by reference to the claiming party's insolvency, and in particular by reliance on the doctrine of insolvency set-off.

The principle that the claiming party's insolvency can be relied upon to resist summary judgment in adjudication enforcement proceedings, where the other party has a cross-claim amounting to an insolvency set-off, is well established. It was considered by the Court of Appeal in *John Doyle Construction Ltd v Erith Contractors Ltd* [2021] EWCA Civ 1452, [2021] Bus LR 1837, in light of the Supreme Court's decision in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, [2020] Bus LR 1140.

In *John Doyle*, the adjudicator had determined the net balance in a final account dispute. The resisting party (Erith) maintained that it had a cross-claim, and that on a true valuation the claiming party (JDC) had been overpaid.

Coulson LJ concluded, notwithstanding dicta in Bresco which might have been thought to point the other way, that JDC was not entitled to summary enforcement. The decision of the adjudicator was a provisional assessment only:

> *"where the decision remains provisional [...] 'it is clear that the rights under the insolvency regime prevail'"*
>
> —*John Doyle* at paragraph 93, approving *Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC) at paragraph 56.
>
> *"I do not consider that the provisional finding of an adjudicator, even on a single final account dispute where no other significant non-contractual or other contractual claims arise, can be treated as if it were a final determination of the net balance, in circumstances where the other party maintains its set-off and cross-claim. It is not a question of security; it is a question of the insolvent company's cause of action being for the net balance only."*
>
> —John Doyle at paragraph 98.

The entitlement following insolvency was to be paid the net balance, and that *"must in law be the balance as finally determined, not as per the adjudicator's provisional view": John Doyle* at paragraph 99. It follows that a resisting party can rely on insolvency set-off even if the cross-claim in question was rejected on the merits by the adjudicator.

## Two further possibilities.

There are two further possibilities which merit consideration.

The first is to rely on an insolvency set-off as a defence during the adjudication itself. There are various technical rules governing the application of insolvency set-off that cannot fully be considered here, including as to the timing of the relevant claims. If it is in principle possible, however, it may in a suitable case be cheaper and more effective to do so rather than to wait until the enforcement stage.

An adjudicator can generally consider an insolvency set-off by way of defence, as part of his or her general jurisdiction to consider any available defence: Bresco at paragraph 63. This includes the possibility of simply making a declaration as to the value of the main claim and leaving the value of the insolvency set-off to be determined separately: ibid.

The ordinary rule is that there is no set-off against a notified sum. Insolvency set-off is different in kind from other set-offs (cf. *Bresco* at paragraphs 27 and 29), but it would nevertheless be necessary to construct an argument that it should be an exception to this rule. Such an argument might be along the lines that the obligation to pay a notified sum is of a *"provisional"* character (*S&T* at paragraph 97), and that, just like the provisional determinations of an adjudicator (as to which, see *John Doyle* above), it cannot be allowed to prevail over the insolvency regime.

However, it would be necessary to confront the implications of section 111(10) for such an argument.

The second possibility is to seek to restrain any notified sum adjudication by injunction.

In *Bresco*, the Supreme Court overturned the Court of Appeal's decision that adjudication during insolvency would generally be futile and so should be restrained by injunction. This was for essentially two reasons:

- A party has a statutory and contractual right to bring a dispute to adjudication. The court should not interfere with that as a matter of principle: paragraph 59.

- The adjudicator's speedy determination of the issues (whether on the main claim alone or any cross-claim advanced by way of set-off) may be of *"real utility"* even if the decision is not as such enforceable: paragraph 63.

It is far from obvious that the latter reason would apply to a notified sum adjudication. The adjudicator does not consider the underlying facts, and so does not contribute to resolving the 'real' dispute. It is at least arguable, therefore, that an adjudication on a notified sum dispute is futile unless it can be enforced.

However:

(a) If, as suggested above, it is possible for the responding party to rely on an insolvency set-off in the adjudication, it may be that the process is not futile if the adjudicator can consider the merits of that set-off, which may be of some utility to the parties on the basis explained in *Bresco*.

(b) In any case, futility does not dispose of the former objection, described in *John Doyle* at paragraph 86 as the *ratio* of *Bresco*. The fundamental point is the statutory and contractual right to make a reference at any time.

## Conclusion.

The best-established and safest routes to avoiding payment of a notified sum to an insolvent contractor are the service of a timely pay less notice; reliance on section 111(10) where it applies (including ensuring that any contract contains an appropriate clause to engage that section); and resisting enforcement following any adjudication. These routes are not comprehensive, however, and it may be that certain claims slip through the cracks.

There may be two more speculative routes. The first is to seek to rely on insolvency set-off as a direct defence to the notified sum claim. The second is to seek to restrain any adjudication by injunction. Whether those would find favour remains unclear.

**This article was first published by Practical Law in June 2022.**

# KEATING CASES

## A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

### **Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd** [2022] EWHC 1842 (TCC) (15 July 2022)

In a judgment handed down on 15 July, Alexander Nissen KC (sitting as a Deputy High Court Judge) rejected the Claimant's arguments that the contractual provisions in respect of liquidated damages were so defectively drafted and/or incomplete that they were void for uncertainty and/or unenforceable. It was possible to find an interpretation of the provisions which gave clear effect to the parties' intentions. Additionally, the Court considered Eco World-Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC) and found that the particular clause in question did not operate as a general limitation of liability provision. The judge also touched on the issue of whether a party can waive its right to challenge the validity of a liquidated damages provision.

**Justin Mort KC represented the Defendant.**

### **Martlet Homes Ltd v Mulalley & Co Ltd** [2022] EWHC 1813 (TCC) (14 July 2022)

Judgment has been handed down in *Martlet Homes Limited v Mulalley & Co. Limited*, the first Decision from the TCC on Fire Safety (External Wall Insulation or "EWI") following Grenfell.

HHJ Stephen Davies (sitting as a High Court Judge) considered the Building Regulations 2000 and 2010, BRE 135 (1988 and 2003 editions), Approved Document B (2002 and 2006 editions) and the BBA Certificates relating to the system (produced in 1995, 2007, 2012 and 2017).

Having done so, he decided that:

1. Martlet succeeded in proving both the existence of the installation defects and the specification breach case.
2. As regards the specification breach case, it was not sufficient for Mulalley to rely on the 1995 BBA certificate, which was the certificate in force at the time. The Sto system should not have been used in the absence of any evidence which showed that it met the performance standards in Annex A of BRE 135 (2003 edition) in accordance with the test method set by BS 8414 (albeit it was not demonstrated that the Sto system would have failed a BS 8414 test). There was also no evidence that the system satisfied all of the general and system specific design principles found in BRE 135 (2003).
3. Martlet was therefore entitled to recover damages by reference to the cost of the replacement scheme.
4. However, had Martlet only succeeded in proving the existence of the installation defects, it would only have been entitled to recover damages by reference to the cost of the repair works scheme.
5. The waking watch costs were recoverable. They were not too remote and in any event were recoverable as a reasonable step taken in mitigation of the far greater loss which would have flowed from an evacuation of the towers.

**Jonathan Selby KC and Tom Coulson represented the Claimant**

**Simon Hughes KC and James Frampton represented the Defendant**

### **Camelot UK Lotteries Ltd v The Gambling Commission** [2022] EWHC 1664 (TCC) (29 June 2022)

The proceedings arose out of a competitive tender for the award of a statutory licence for operation of the National Lottery ("the Fourth Licence"). The Claimants (Camelot and IGT) opposed the Defendant's application and sought to maintain the suspension, preventing the Defendant from awarding the Fourth Licence to the successful applicant in the competition, Allwyn Entertainment Limited (Allwyn) pending the outcome of the trial.

In lifting the suspension, O'Farrell J was satisfied that damages would be an adequate remedy for the Claimants.

The Court accepted the Defendant's case that damages would not be an adequate remedy if the suspension were maintained as there would be inevitable delay to the start of the Fourth Licence, resulting in real losses that would be very difficult to quantify and would not be compensatable in damages.

The balance of convenience lay in lifting the automatic suspension. Even if the hearing could be concluded by the end of October 2022, and a swift judgment produced thereafter, that would still entail a significant delay to the commencement of the transition period, and there remained the possibility of an appeal. The contingency in the implementation period had already been eroded and Camelot, the incumbent under the existing licence, provided for a minimum transition period of 18 months. Therefore, it was inevitable that there would be delay to the start of the Fourth Licence.

The Court also rejected the alternative proposals by Camelot and IGT including partial implementation by Allwyn and partial lifting of the suspension. These proposals carried a very high risk of irremediable injustice to the Defendant and Allwyn.

**Sarah Hannaford KC represented the Defendant.**

## **Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP** [2022] EWCA Civ 823 (21 June 2022)

The Court of Appeal considered whether a collateral warranty in principle could be a construction contract for the purposes of section 104 of the Housing Grants, Construction and Regeneration Act 1996, and whether it was on the facts. In deciding the points in the affirmative the Court of Appeal allowed the appeal by majority (Coulson and Peter Jackson LJJ; Stuart-Smith LJ dissenting).

**Tom Owen appeared represented the Appellant**

## **Essential Living (Greenwich) Ltd v Elements (Europe) Ltd** [2022] EWHC 1400 (TCC) (08 June 2022)

This was a Part 8 claim for declaratory relief concerning the extent to which an adjudication decision on an interim account, is binding on the parties for the purpose of an ongoing final account process under the contract, and any further adjudication, pending final resolution of the matters by litigation or settlement.

O' Farrell J held that:

1. the parties were bound by the Adjudication Decision on any dispute or difference determined therein until it is finally determined by the court or by subsequent settlement;

2. the parties could not seek a further decision by an adjudicator on a dispute or difference if that dispute or difference had been the subject of the Adjudication Decision;

3. the Adjudication Decision was not binding on the parties for the purpose of the Construction Manager's final determination of the Completion Period under clause 2.27.5 of the JCT contract, from which would flow any liability on the part of the Defendant for liquidated damages and finance charges (Mailbox *(Birmingham) Ltd v Galliford Try Building Ltd* [2017] Bus LR 2103 distinguished);

4. the Adjudication Decision was not binding on the parties for the purpose of determining the Final Trade Contract Sum;

5. the Adjudication Decision was binding in respect of variations considered and assessed by the adjudicator, unless and until the decision is overturned, modified or altered by the court, or unless either party identifies a fresh basis of claim (i.e., amounting to a new cause of action) that permits such variation claim to be opened up and reviewed under the terms of the Contract;

6. it was a matter of fact and degree, requiring careful analysis of the evidence and argument on each disputed item, as to whether the Adjudication Decision was binding on any other discrete issue referred to and determined by the adjudicator, unless and until the decision is overturned, modified or altered by the court;

7. it was a matter of fact and degree as to whether any matters which the Defendant might seek to refer to a subsequent adjudication are the same, or substantially the same, as the matters determined by the Adjudication Decision; absent any notice of adjudication before the court, it was not possible for this issue to be determined.

**Alexander Nissen KC represented the Defendant**

## **FTH Ltd v Varis Developments Ltd** [2022] EWHC 1385 (TCC) (08 June 2022)

The Court refused summary judgment on adjudication decisions in favour of the Claimant in a CVA.

There was a real risk shown by the Defendant that summary enforcement would deprive the Defendant of security for its cross-claim.

If it had been necessary to do so, the Court would also have granted a stay of execution in favour of the Defendant.

**Tom Owen represented the Defendant**

## **Advance JV & Ors v Enisca Ltd** [2022] EWHC 1152 (TCC) (16 May 2022)

The Court dismissed a Part 8 claim seeking a declaration regarding the validity of a pay less notice, finding the one that had been served related to a later application for payment. Consequently, the sum applied for became the notified sum under section 111 of the Housing Grants, Construction and Regeneration Act 1996.

Smith J held that pay less notices must be referable to a particular payment notice and/or payment application and must relate to a particular payment cycle.

The judgment once again highlights that the only way to avoid a smash and grab adjudication and a payment liability in circumstances where one might not otherwise exist (the pay less notice showed an overpayment to Enisca) is to ensure that valid payment and pay less notices are served.

**Piers Stansfield KC represented the Claimant**

**Alexander Nissen KC represented the Defendant.**

# THE IMPACT OF A WAR ON SUPPLY LINES: FORCE MAJEURE OR FRUSTRATION?

**With the war in Ukraine and widespread introduction of economic sanctions causing significant disruption to world markets for commodities and raw materials, Veronique Buehrlen KC considers the impact on contractual obligations in construction contracts/projects and, specifically, revisits the requirements of the doctrine of frustration.**

By Veronique Buehrlen KC

The war in Ukraine and widespread introduction of economic sanctions, both by and against Russia, have and continue to cause significant disruption to world markets for commodities and raw materials. Supply chains, still reeling from the impact of the Covid-19 Pandemic, are seeing further unprecedented disruption – unprecedented since WW2. The rising cost of living in the United Kingdom is nothing on the rising cost of key raw materials for major construction and infrastructure projects. Aluminium, copper, bitumen, pig iron and iron ore used in the manufacture of steel are only some of the raw materials seeing significant price hikes to name but a few. But it is not only price increases that are the problem. We are seeing significant issues in relation to shortages of materials and disruption to procurement routes and processes which are in turn causing or will, in the medium to long term, cause critical delay to major construction projects. Even if the war in Ukraine comes to an end, it seems unlikely that economic sanctions will be lifted in anything approaching the short term.

We are therefore once more pouring over the proper construction of Force Majeure clauses this time to determine where the risk of a war in Ukraine and / or the imposition of economic sanctions fall. Once more change of law clauses are coming to the fore. Suspension and termination of projects are similarly back on the agenda. As commercial and construction lawyers, experience of the Pandemic and its impact on major projects has ensured that this is now well trodden ground. Similarly, Project Management teams are much better versed in how to react and how to try to overcome the impacts of seriously disrupted supply chains. A key doctrine that falls within the armoury of those most seriously affected by the impact of an unforeseen event on their contractual obligations is that of frustration. It therefore merits revisiting. The doctrine saw some outing in English case law in the context of the Pandemic albeit largely in relation to aircraft or other types of leasing – an inevitable consequence perhaps of aircraft being grounded and leisure facilities closed because of the Pandemic. We are, however, now in a different ball park – in some instances compounding significant delays and increased costs caused to Projects by the Pandemic. Contracts drafted post February 2019 that were careful to provide for Covid were not anticipating this.

## Contractual provisions and frustration

Before launching on the complex question of whether a contract has been frustrated by an event occurring post execution of the contract, the first question to ask is whether the occurrence of the event has been provided for by the contract. If the contract treats the affected obligation as absolute regardless of any subsequent event that may preclude the doctrine of frustration from getting a look in, although general wording may not be sufficient to capture an unforeseeable event.[1] That said, the imposition of absolute obligations is unusual in construction contracts. More likely, particularly in detailed construction contracts executed between experienced

1 Bailey v De Crespigny (1869) L.R. 4 Q.B. 180; Metroplitan Water Board v Dick, Kerr & Co. Ltd. [1918] A.C. 119.

employers, contractors and subcontractors is that the risk of the event occurring has been provided for by the contract, and thus allocated between the parties, such as through the mechanism of a Force Majeure (FM) or change of law clause. If that is the case, then the doctrine of frustration is again unlikely to apply. The wider the ambit of the contractual clauses, the narrower is the practical scope of the doctrine.[2] That said, wide wording will not always be sufficient to encompass any event. In *Wong Lai Yin v Chinachem Investment Co. Ltd*,[3] a contract for the construction and subsequent sale of a building contained a FM clause which provided that the Vendor could terminate the contract *"should any unforeseen circumstances beyond the Vendor's control arise"*. The works were destroyed by a landslide during construction. The Privy Council held that the clause could not be construed as providing for the possibility of the landslide.

FM clauses invariably identify *"war"* as an event of Force Majeure but care should be taken not to assume that this means that the war in Ukraine will automatically fall within a particular clause. The applicable case law includes cases where the war in question was found not to fall within the FM clause relied upon. Take *Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd.*[4] The FM clause provided for an extension of time to be granted to the supplier of machinery to Poland *"should despatch be hindered or delayed … by any cause whatsoever beyond our reasonable control, including … war"*. War broke out in September 1939 and Poland was occupied by the Nazis. The House of Lords held that the war contemplated by the FM clause was not of the type that World War II entailed. The clause contemplated a minor delay that could be provided for by an EOT, not the type of prolonged and indefinite interruption to contractual performance that WWII entailed. At the other end of the spectrum, some may seek to argue that the war in Ukraine is no such thing invoking, as Russia has done, Article 51 of the UN Charter. Then again, it may not be necessary to establish whether the conflict meets the definition of "war" if the FM clause extends, for instance, to *"hostilities (whether war be declared or not)"*.[5]

Further, a FM clause will in all probability require the supervening event to be the cause of the affected party's inability to perform. That often leads to complex issues of causation. Where, for instance, a contractor is prevented or hindered from performing its obligations because of severe disruption to its supply chains, the question must be asked: has that disruption been caused by the war in Ukraine or by the economic sanctions regimes imposed by and against Russia and, if the latter, does it make a difference? Each clause falls to be construed according to the terms of the particular contract in question.

## The doctrine of frustration

The currently prevailing approach to the doctrine is that it will arise where performance of the contract has been rendered radically different because of a change in circumstances post execution of the contract.[6] Chitty On Contracts provides the following definition:

> *"A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract."*[7]

The legal test stems from a construction case: *David Contractors Ltd v Fareham Urban District Council*[8] that may prove useful by way of analogy to the supply line disruptions that are causing significant increases in costs and delays today. The facts were these: in 1946 the plaintiffs agreed to build 78 houses for the defendant within a period of 8 months. There were significant delays to the build because of a shortage of labour caused by unexpected delays in the demobilisation of troops post WWII and difficulties in obtaining materials. An 8 month project turned into a 22 month project and the contractor incurred an additional 25% in costs. The contractor sought to rely on the doctrine of frustration to establish that the contract had been discharged and to sue for payment based on a quantum meruit. In short, the House of Lords held that, although there had been an unexpected turn of events which rendered the contract more onerous to

2 See Chitty On Contacts 34th Ed at para. 26-003

3 (1979) 13 Build L.R. 81

4 [1943] A.C. 32.

5 See, for instance, the definition of Force Majeure at clause 19.1 of the FIDIC Silver Book 1999, now "Exceptional Events" in the FIDIC suite of contracts (Clause 18), and at clause 15.2(a) of the LOGIC General Conditions of Contract for Construction. For a detailed commentary on the general principles in relation to frustration and the impact of war see Chapter 15 of Keith Michel's War, Terror and Carriage by Sea 2004.

6 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675 at p. 688; *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 Ch, per Marcus Smith J at [26-27].

7 Chitty On Contract 34th Ed, para. 26-001.

8 [1956] AC 696, 729. See in particular the judgment of Lord Radcliffe at page 729 and Lord Reid at page 723.

perform than had been contemplated by the parties at the time the contract was entered into, that did not mean that the job was different to that contemplated by the contract. Lord Reid's approach is worth citing: *"the question is whether the causes of delay or the delays were fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply"*. There are, of course, grounds for distinguishing how the doctrine was applied in Davis Contractors from the supply chain issues that are currently being experienced as a result of the war in Ukraine and associated economic sanctions. However, the case illustrates two things, *firstly* the test for frustration and *secondly* how difficult it can be in practice to establish that a contract has been frustrated. That said, difficult does not mean impossible.

The applicable test was restated by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700. Frustration arises where the supervening event *"so significantly changes the nature of the outstanding contractual rights and/or obligations"* that it would be unjust to hold the parties to their bargain in the new circumstances. Mere additional expense and onerousness will not be enough. But what does all this mean in practice? *Firstly,* one must construe the terms of the contract to determine the scope of the original obligation. That exercise will need to be undertaken in accordance with well accepted principles of contract interpretation. The Court or Tribunal will need to look at what the parties' obligations entailed in terms (for instance) of time, labour, money and materials. *Secondly,* the Court or Tribunal will need to establish what the situation, post the supervening event, now requires. *Thirdly,* a comparison of the original obligation with the new obligation will be required to determine whether the new obligation is a *"radical"* or *"fundamental"* change from that undertaken under the contract.

However, it is not just a question of construing the contract. Current case law favours what is described as a *"multi-factorial"* approach to frustration meaning that one must look at all the facts and circumstances of the case. To quote Rix LJ in *The Sea Angel:*

> *"In my judgment, the application of the doctrine of frustration required a multi-factorial approach. Among the facts which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances … the mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances."*[9]

This means an in-depth inquiry into the factual matrix at the time the contract was entered into including an investigation of the parties' knowledge, expectations and assumptions in particular as to risk. It also means the need for a detailed understanding of the consequences of the event on the affected party's performance of its obligations.

Impossibility of performance presents relatively (being the operative word) few difficulties in the sense that if the obligation has become impossible to perform then the doctrine ought to apply. However, establishing whether an obligation has become impossible to perform may itself be difficult. *First* the obligation has to be defined. A shortage of materials in the market may make it impossible to complete the construction of a structure by a certain date. However, that impossibility may merely give rise to a delay in performance of the obligation that in itself will not amount to impossibility of performance.

Depending of course on the circumstances of the case, more challenging may be determining whether the supervening event has transformed the original obligation into a radically different obligation to that originally contemplated by the contract. The extent to which the obligation must have changed is uncertain and each case will depend on its own facts. That is because whether the supervening event will have operated to frustrate the contract is in essence a question of degree – an increase in costs, even a significant one, is unlikely without more to be sufficient to trigger the operation of the doctrine. A delay will in turn have to be abnormal if it is to fall outside what the parties might have reasonably contemplated when contracting. Relevant factors will include the nature of the contract, the cause of the delay, its length or probable length and how it impacts the parties' obligations.

These are the basics but it is safe to assume given the unprecedented events to which supply chains are subject that the doctrine is once more going to play a part.

9 *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547 at [111] per Rix LJ.

INTERVIEW WITH

# VERONIQUE BUEHRLEN KC

**You have been shortlisted as "Arbitrator of the Year" by the Legal 500, what do you think the most important skills of an arbitrator are?**

I would put the ability to listen carefully and to see the wood from the trees pretty high up on my list. A full and proper understanding of the concept of fairness and the need to ensure that both parties have the opportunity comprehensively to present their respective cases is in my view key. It then goes without saying that a detailed knowledge of the arbitral process is also very important as well as a willingness to step in and take control of proceedings when needed.

**You have a mixed practice which includes instructions as arbitration counsel alongside arbitrator appointments, how does your experience in each of these roles help in the other?**

I think the dual role gives me a huge advantage. When acting as arbitrator I have not forgotten what is involved for the parties and their counsel in preparing their respective cases, what works, what does not work and how long it takes. When acting as counsel I have a detailed understanding of what it is that the Tribunal needs in order to come to a decision and to draft an award as well as an understanding as to how the various arbitration institutions work.

**You also sit as a Deputy High Court judge in the TCC, has this experience influenced your approach to counsel work?**

Yes certainly. Sitting as a Deputy High Court judge has given me a much more in-depth understanding of the workings of the Court and of what it is a judge requires from counsel and why. Sitting on the other side of the desk gives you an invaluable insight, particularly in terms of advocacy and the presentation of a case to the Court.

**Clients recommend you as "working at the coal face of the dispute". Why do you think this is so valued in our industry?**

Many of the cases we deal with involve detailed and complex projects – the devil is in the detail, so to speak, so it is key to fully understand it. Fully understanding your case also gives you a significant advantage in Court or in any other hearing. It also means that I am very much part of the legal team which is something I enjoy. I think it can be key to the success of certain types of cases to have a team whose leader is willing to be fully immersed in the case and to help with whatever needs to be done.

**What is the most interesting project you have worked on to date?**

I have done more interesting cases than I can count but I suppose that the South Stream litigation would be pretty much top of my list. The case was factually, legally and evidentially complex and overlayered by the geopolitical issues involved. Other fascinating cases over the years include a case about the theft of a masterpiece out of Cuba in the 1950s and a case concerned with events impacting the release of Star Wars Episode VII: The Force Awakens, albeit that neither of those were construction nor arbitration cases!

**What has been the most rewarding experience of your career so far?**

That is a very difficult question. I am thrilled to be a Silk and to sit as both a Deputy High Court Judge and an international arbitrator doing really interesting work. I often ask myself "what's not to like"?

**What do you think are the biggest challenges currently facing the construction industry?**

I think there are numerous challenges but delays to supply chains and force majeure are key issues impacting most of the cases I am involved with.

**Outside of the law, what are your other interests?**

I read and I garden (keeps me sane), and I try to keep my son and daughter in check!

# 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].

# "INTERESTING TIMES": SANCTIONS, BONDS AND LITIGATION[1]

**There are, as at the date of writing,[2] 978 individuals and 98 entities on the Office of Financial Sanctions Implementation ("OFSI") Consolidated Russia sanctions list ("the Consolidated List"). The list exists under section 43 of the Sanctions and Anti-Money Laundering Act 2018 ('the Sanctions Act'), the Russia (Sanctions) (EU Exit) Regulations 2019 SI 855 ("the Regulations") as amended twice in 2020 and six times in 2022 alone.**

By Sean Wilken KC

In crude terms, the way in which the regime operates is that an individual is designated for sanctions purposes under Regulation 5 of the Regulations. On designation, sanctions are imposed limiting the designated person's ability to participate in transactions or receive various services.[3]

Then, Regulation 11 imposes an asset freeze. Regulations 12 – 15 then bite on the making available of funds, finance or economic benefit. Regulation 16 deals with money market securities. Regulation 17 bars loans and credit arrangements, whilst Regulation 17A deals with correspondent banking arrangements. All the Regulations are framed to catch indirect funds, economic benefits and loans and credit arrangements. Finally, all of Regulations 11 – 17A permit OFSI licensing of certain transactions and arrangements.

There are two sets of provisions[4] that are particularly relevant to commercial and construction litigators,[5] and then even more specifically, to the financing of large infrastructure or other property developments.

The first is Regulation 64, which permits a Treasury licence to be issued legitimating what would otherwise not be permitted under Regulations 11 – 17A. Part 1 of Schedule 5 to the Regulations permits Treasury license exemptions to the asset freeze and banking relationship controls for the "reasonable" legal fees incurred by the designated person.[6] It is this provision that lawyers acting for any designated person must fall within and they must apply for an OFSI licence to that effect. Given the length of the designated persons list and the breadth of its cover, applying for a licence may be cumbersome and there is little guidance as to how applications for licenses may be considered or, indeed, as to what are reasonable legal fees.

1 One issue that arose in February/March 2022 was whether sanctions questions were ones with which the Bar needed to concern itself. That issue was resolved by a BSB Circular dated 31 March 2022 unequivocally stating that the Bar had to ensure that it was compliant with all aspects of sanctions and OFSI licences.

2 26 – 31 March 2022

3 There is a procedure to challenge designation but the prospects of a successful challenge against the current Russian sanctions targets may be slim.

4 I do not deal in this short paper with the compliance issues associated with sanctions compliance for the legal profession. In terms of the Bar, the BSB circular would require, for example, checking of client lists as against the Consolidated List. Further complications are added as a result of the Economic Crime (Transparency and Enforcement) Act 2022.

5 As opposed to those working in financial markets or general financing arrangements.

6 See paras 3 and 9M of Schedule 5

The second turns on the definition of funds. As set out above, Regulations 12 – 15 bite on the making available of funds. Under section 60 of the Sanctions Act, funds is defined to mean:

*In this Act "funds" means financial assets and benefits of every kind, including (but not limited to)—*

*(a) cash, cheques, claims on money, drafts, money orders and other payment instruments;*

*(b) deposits, balances on accounts, debts and debt obligations;*

*(c) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative products;*

*(d) interest, dividends and other income on or value accruing from or generated by assets;*

*(e) credit, rights of set-off, guarantees, performance bonds and other financial commitments;*

*(f) letters of credit, bills of lading and bills of sale;*

*(g) documents providing evidence of an interest in funds or financial resources;*

*(h) any other instrument of export financing.*

Thus, under the regime, both performance bonds and letters of credit are caught. This raises two particular issues for both; both issues flowing from the nature of performance bonds and letters of credit as supposedly autonomous instruments. As these instruments facilitate international trade and infrastructure and property developments, the fact these instruments now fall within the sanctions regime may have unexpected consequences.

As Donaldson MR put it in *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 WLR 392:

> *"The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined."*[7]

Thus, letters of credit and performance bonds (and in particular on demand performance bonds) are autonomous instruments – existing separate and distinct from the underlying transaction. Thus, the instruments can supposedly be relied on irrespective of the merits of the underlying transaction.

Standardly, the extent and application of the autonomy principle only raises its head where the Beneficiary of the instrument (that is the one receiving some form of credit arrangement or the benefit of an assisted trade transaction) seeks to restrain

7 See also *Tetronics (International) Ltd v HSBC Bank Plc* [2018] EWHC 201 (TCC) at [26]


payment by the Bank/Guarantor to the creditor or Obligor.[8] As the instrument is autonomous, anyone seeking to restrain the Bank/Guarantor will need both to have an independent cause of action and grounds for impugning payment under the instrument as against the Bank/Guarantor. This is usually expressed as a fraud exception.[9] Yet even with the fraud exception, where the Bank/Guarantor is not the Beneficiary's own bank,[10] it is difficult to see what the cause of action the Beneficiary has against the Bank/Guarantor is.[11] Allied to that is a further principle, however, which perhaps is even less appreciated. At least where one is dealing with an on-demand bond or letter of credit, absent fraud or potentially a demand in breach of the underlying contract,[12] there can be no injunction to restrain the Obligor from calling on the instrument – for that would violate the autonomy principle.[13]

Thus, the autonomy principle gives the Obligor the right to demand payment irrespective of an underlying dispute. Similarly, as the letter of credit/on demand performance bond are "equivalent to cash" they can be negotiated – that is transferred or signed over as further security for separate and independent credit and thus potentially "traded".

The current sanctions regime, however, disturbs the autonomy principle, and therefore letters of credit and bonds, in two very critical ways. The sanctions regime requires one to know whom is directly or indirectly benefitting from the letter of credit or performance bond. Is a designated person in some way receiving funds or economic benefits or credit from the letter of credit or performance bond? Similarly, enquiries have to be made as to which entities are in the banking chain and are any of those sanctioned entities. If so, unless there is a Treasury licence, then the receipt of that benefit is blocked by sanctions and the payment of that benefit would be an offence and therefore potentially illegal.[14] Further, it would be arguable that an instrument which did not directly breach sanctions, but sought to evade them, would be similarly unenforceable.[15] Thus, a sanctions related issue would provide a potential defence to a call on a letter of credit or performance bond.

This position may be compounded if, as and when a letter of credit or performance bond were negotiated. An obvious result of the letter of credit or performance bond being used as further collateral is that the number of entities involved in the transaction would increase. In certain cases that would inevitably raise issues as to the identity of those entities, their sanctions status and intended or inadvertent sanctions busting.

In normal circumstances, the risks of sanctions law impacting on letters of credit and bonds might be regarded as slim. Indeed, there are doubts expressed as to whether either the regulatory framework or the political will are sufficiently robust for sanctions properly to bite. That said, these are not normal circumstances, and the wording of the sanctions will need to be given effect. Before sanctions were imposed, it was well known that a considerable volume of monies ex the former Soviet Union/Russian Federation were being deployed in global markets in many and various types of transactions – often via the use of several monetary instruments and various holding companies in differing jurisdictions.[16] The length of the sanctions list and the breadth of its targets must, it would seem, give one further pause as to whether particular transactions or instruments were involved in such flows of money from Russia and whether, therefore, the sanctions regime is now in play. If so, further thought would have to be given as to whether there was now an illegality defence to any call on the letter of credit or bond.

8 In the following discussion, I refer to the party that issued the instrument and will pay against it as the Bank/Guarantor; the party making the claim as the Beneficiary and the party in default triggering the claim against the instrument as the Obligor.

9 Recently reiterated in Alternative Power Solution Ltd v Central Electricity Board [2014] UKPC 31 at [56 ff] but a long standing principle in English law.

10 Where the Obligor can rely on the bank mandate between it and the Bank/Guarantor.

11 As the Court of Appeal recognised in United Trading Corp v Allied Arab Bank [1985] 2 Lloyd's Rep 554 at 561

12 Sirius International Insurance Co v. FAI General Insurance Ltd [2003] EWCA (Civ) 470 at [26 – 7]; MW High Tech Projects UK Ltd v Biffa Waste Services Ltd [2015] EWHC 949 (TCC) at [28 – 34]

13 Group Josi Re v Wallbrook [1996] 1 Lloyd's Rep 35 casting significant doubt on Themehelp Ltd v West [1996] QB 84

14 As to the complexities which can ensue – see Libya Arab Foreign Bank v Bankers Trust Co [1989] QB 728. As sanctions are suspensory, sanctions could not frustrate the contract in Bankers Trust – see 772 B – E.

15 See Regazzoni v KC Sethia (1944) Ltd [1956] 2 QB 490

16 There is extensive (and controversial) literature on the subject but for present purposes see purely by way of example "The London laundromat: will Britain wean itself off Russian money?" FT 4/3/22

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