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.