KC LEGAL UPDATE

Summer 2023

In this issue...

KEATING CHAMBERS

WELCOME

to the Summer 2023 edition of KC LEGAL UPDATE

We would like to open this edition of our Keating Legal Update by extending our congratulations and warmly welcoming our three newest Members of Chambers: Adam Walton; Lars Gladhaug; and Mercy Milgo, who have all successfully completed their pupillage with us and have now accepted offers of tenancy to begin in September 2023. We are also very much looking forward to welcoming our three new pupils in September.

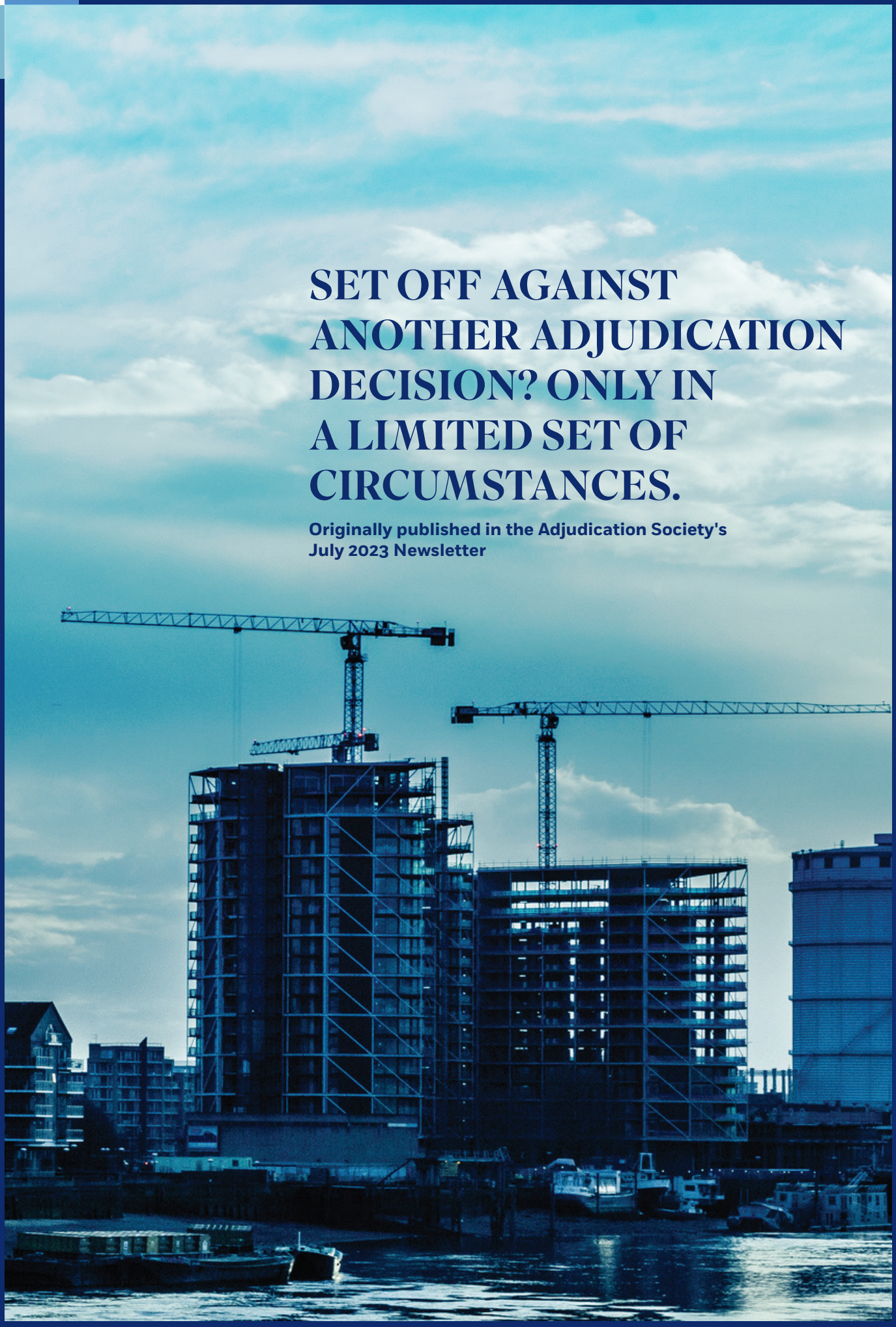
With a focus on pupillage, this year we have already run a number of successful initiatives and met some brilliant aspiring barristers; we have welcomed two mini-pupils from *Bringing [Dis]Ability to the Bar*, we awarded our first ever scholarship in association with Gray's Inn, and we ran our second annual Lamb Building Keating Chambers Joint Summer School with some excellent feedback. Coming up this month we will be welcoming our second 10,000 Black Interns student and running another TCC Insight Day with sixth form students from lower socioeconomic backgrounds; both schemes designed to increase diversity and social mobility at the Bar. As we move through the year there are more opportunities for us to meet and hopefully inspire some future pupils to a career at the commercial Bar. From October Chambers will be attending several pupillage fairs, both in-person and virtually, and hosting our annual Women at the Commercial Bar event – so if you are considering a career as a specialist construction barrister or you would simply like to find out more about what this entails, please come and speak to us at one of these events as we would be delighted to meet you.

In this summer edition we are delighted to bring you articles from Sean Wilken KC, Simon Taylor, Emma Healiss, James Frampton and Thomas Saunders. Articles from Sean and Simon each explore different aspects of competition and procurement law in the context of government contracting, Emma discusses Adjudication, and James and Thomas' article, originally published as a three-part series, looks at limitation and adjudication following the recent judgment in *LJR Interiors Ltd v Cooper Construction Ltd*. We have also included interviews with Will Webb KC, following his appointment to silk earlier this year, and Thomas Saunders, who discusses the development of his practice to date, since being called to the Bar in 2019.

CONTENTS

SET OFF AGAINST ANOTHER ADJUDICATION DECISION? ONLY IN A LIMITED SET OF CIRCUMSTANCES.

Originally published in the Adjudication Society's July 2023 Newsletter



By Emma Healiss

"...this is a situation where every possible feature of a building contract is in play: defects, delays, valuation disputes and termination/repudiation. In such circumstances, absent ADR or a swift settlement, I do not consider that serial (and nakedly tactical) adjudications are the best method of achieving a comprehensive and binding resolution of the disputes between the parties."

Notwithstanding these prudent comments from Coulson J (as he then was) in *JPA Design and Build Ltd v Sentosa* (UK) Ltd [2009] EWHC 2312 (TCC), it remains common practice for parties to commence multiple adjudications against one another, often for tactical reasons.

For example, party A might obtain a favourable adjudication decision ordering party B to pay it £10,000 due to party B's failure to serve a timely and valid pay less notice. Party B might separately commence adjudication proceedings claiming damages of £12,000 following party A's repudiatory breach of the contract. If party B succeeds in its claim in full or in part, it may contend that it should not be required to make payment of the £10,000 to party A pursuant to the first adjudication decision, because the second decision should be set off against the first.

As we have recently been reminded by the case of *FK Construction Limited v ISG Retail Limited* [2023] EWHC 1042 (TCC), the circumstances in which the court will permit one adjudication decision to be set-off against another are limited. Fundamentally, this is because of the court's well-established, robust approach to adjudication enforcement.

FK Construction Limited v ISG Retail Limited

The facts

The relevant facts are, in summary:

1. FK applied to enforce an adjudication decision of Mr Allan Wood directing ISG to pay c.£1.7m plus interest and costs (the "Wood Decision").

2. FK and ISG had engaged in six other sets of adjudication proceedings.

3. In one of the decisions (the "Molloy Decision"), which related to the same project as the Wood Decision, the adjudicator had determined that the gross value of the works was c.£3.7m. As ISG had already paid c.£2.8m in respect of FK's works on that project, this suggested that FK's further entitlement on that project was c.£900,000.

4. Three of the adjudications related to a different project, referred to as Project Triathalon. The net effect of the three decisions (the "Triathlon Decisions") was that FK owed to ISG the sum of c.£67,000.

5. ISG resisted enforcement on the grounds that the court should exercise its discretion to order a set off or withholding against the Wood Decision by reason of the Molloy Decision and/or the Triathalon Decisions.

6. ISG did not otherwise challenge the validity or enforceability of the Wood Decision.

Applicable principles

The general position is that adjudicators' decisions which direct the payment of money by one party to the other are to be enforced summarily and expeditiously unless there is a valid jurisdictional or natural justice defence which renders enforcement inappropriate.

It follows from this general position that, where parties engage in sequential adjudications, the correct approach is generally that parties must comply with each decision in turn at the end of each adjudication. As Jackson J (as he then was) explained in *Interserve Industrial Services Limited v Cleveland Bridge UK Limited* [2006] EWHC 741 (TCC):

> *"...Where parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues..."*

There are, however, considered to be at least three limited exceptions to this general position:

1. First, where there is a specified contractual right to set off. This will be a relatively rare exception because, if the contractual provision offends against the statutory requirement for immediate enforcement of an adjudicator's decision (see section 108 of the 1996 Act and 30.1 of the Scheme), the provision will be struck down as unenforceable.

2. Second, where it follows logically from an adjudicator's decision that the adjudicator is permitting a set off to be made against the sum otherwise decided to be payable. An example might be where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing a balance should actually be paid, a legitimate set off or withholding may be justified when that amount falls due for payment or certification in the future. It is necessary to analyse the decision itself to determine whether this exception arises.

3. Third, where there are two valid and enforceable adjudication decisions involving the same parties whose effect is that monies are owed by each party to the other, the court has a discretion in an appropriate case to set one of the decisions off from the other.

The third exception

ISG sought to rely on the third exception, in relation to which there are two authorities of particular relevance.

The first is *HS Works Limited v Enterprise Managed Services Limited* [2009] EWHC 729 (TCC), where Akenhead J identified the following steps that needed to be considered before the court would permit one decision to be set off against another:

1. First, it is necessary to determine at the time when the court is considering the issue whether both decisions are valid. If not, or if it cannot be determined whether each is valid, it is unnecessary to consider the next step.

2. If both are valid, it is then necessary to consider if both are capable of being enforced or given effect to. If one or the other is not so capable, the question of set off does not arise.

3. If it is clear that both are so capable, the court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.

4. How each decision is enforced is a matter for the court. It may be wholly inappropriate to permit a set off of a second financial decision as such in circumstances where the first decision was predicated upon a basis that there could be no set off.

On the facts of the case, the judge determined that the two adjudication decisions he was asked to enforce were valid and enforceable, that the parties and the court were required to give effect to both decisions, and that the practical way forward was to make an order that reflected the net effect of the decisions (rather than ordering one party to pay a sum with the other party then immediately being required to hand back all or the bulk of what had been paid).

The second relevant authority is *JPA Design and Build Limited v Sentosa (UK) Limited* [2009] EWHC 2312 (TCC). JPA had an adjudicator's decision in its favour worth £300,000 and Sentosa had a decision in its favour worth £180,000. The judge permitted Sentosa's claim to set off the £180,000 against the £300,000, referring to the court's *"equitable jurisdiction"* to set off judgments or orders for payment against one another.

Smith J's decision

Smith J rejected ISG's claim for a set off (or withholding) either in respect of the Molloy Decision or the Triathlon Decisions on the basis of the guidance given by Akenhead J in *HS Works* for the following reasons:

1. ISG fell at the first hurdle of validity. It had not commenced enforcement proceedings in respect of the Molloy Decision or the Triathalon Decisions, and therefore the court could not consider (nor had it been asked to consider) whether those decisions were valid. This was in contrast to *HS Works* and *JPA*, where the court was dealing with the enforcement of the two decisions simultaneously.

2. Similarly, in the absence of enforcement proceedings in relation to those Decisions, the court could not determine whether the Molloy Decision or the Triathalon Decisions were capable of being enforced.

3. The fact that no separate proceedings had been commenced to enforce the Molloy Decision or the Triathalon Decisions meant that ISG also failed at the third step of the analysis.

4. In these circumstances, the court did not have a discretion to permit a set off or withholding. However, if it had such a discretion, no set off or withholding would have been permitted because (a) there was no suggestion in the Wood Decision that there might be a set off or withholding against the sum due, (b) no payments were due or flowing from the Molloy Decision and ISG had not sought to allege any overpayment in the context of that adjudication and (c) an order in the terms sought by ISG would plainly undermine the court's robust policy of enforcement and would risk undermining the purpose of the 1996 Act.

FK was therefore granted summary judgment enforcing the Wood Decision in full.

Conclusions

It remains the case that it will be in only very limited circumstances that the court will permit a party to set off one adjudication decision against another. What the decision in *FK Construction* makes clear is that, if a defendant in enforcement proceedings wishes to rely on a second decision to claim a set off (on the basis of the 'third exception'), it is essential for the defendant to have commenced separate proceedings to enforce the second decision. It is also probably necessary for the defendant to convince the court to hear the two sets of enforcement proceedings together. It seems that a failure to do so will likely be fatal to the claim for set off – not least because the court will be unable to consider the validity and enforceability of the second decision.

A further interesting issue that arose in *FK Construction* was whether an adjudication decision in relation to one construction project could be set off against an adjudication decision in relation to another construction project. Smith J noted that this point was *"entirely novel"*, but that it did not need to be determined in light of her other conclusions. Given that it is relatively commonplace for the same parties to be engaged on multiple projects and to engage in adjudications across those projects, this point will almost certainly come before the court again in the future. As a matter of principle, there do not appear to be any good reasons why set off should not be permitted in such a context, provided the criteria set out by Akenhead J in *HS Works* are satisfied.

WILLIAM WEBB KC

Q&A

William Webb KC, who took silk earlier this year, is described as a "brilliantly analytical barrister" whose advocacy is "elegant and persuasive". He has a strong track record in handling claims relating to defects, variations, delay and disruption across a wide range of projects, from residential developments to large-scale infrastructure ventures. He is also knowledgeable and experienced in fire safety matters, particularly in cladding disputes, and has been involved in the Grenfell inquiry. William frequently appears in the Court of Appeal, TCC, Commercial Court and Chancery Division, as well as substantial international arbitrations. He is also a TECBAR accredited adjudicator and has received appointments as adjudicator and arbitrator in both domestic and international disputes.

As a construction barrister, what are some of your career highlights?

That's a difficult question because in many ways it's the variety of the work we do which is so appealing. All my trips to the Court of Appeal have been highlights because you end up arguing points of important principle in front of a tribunal of three of the most able judges you will encounter. Cases like *Balfour Beatty v Grove* [2016] EWCA Civ 990 and *BDP v Standard Life* [2021] EWCA Civ 1793 were great cases to be involved in as they developed the law and practice in our field.

However, above all it's the trials that I enjoy. That's the real sharp end of your practice as a construction barrister where everything you've done on the case to date is tested. Your pleadings will be scrutinised, your review of the evidence validated, your advice tested and, of course, your advocacy may be the difference between your client winning and losing. They're the most stressful part of our work, but also the most rewarding.

What guidance would you offer law students aspiring for a career at the commercial Bar?

I think the main tip I would give to all law students who want to enter commercial law is to read the cases. When studying law for the first time, there is always a temptation to just rely upon case summaries and nutshells. The case reports seem long and daunting, particularly lengthy Supreme Court decisions with dissents. However, reading the cases properly builds up an innate understanding of how legal principles operate and how judges think, which is indispensable as you progress. A detailed understanding of how judges reason in their decisions will help an aspiring commercial barrister get the degree result that they need to boost their application forms, help them address and answer questions at pupillage interview and finally help them to flourish and succeed during pupillage and tenancy.

A major part of being a barrister is predicting what judges or tribunals will do. What they will think are good points and what they will think are bad points. This applies not just when giving advice on the merits of a case, but also more generally. Every submission you make, every counterpoint you prepare for, every question you ask a witness is with an eye on what you think will appeal to the ultimate decision-maker and what you think will not. You don't realise it at the time, but reading cases is the first step to building up that knowledge and enables you to hit the ground running when you do make it to the commercial Bar.

What are some of the realities and rewards of being a construction barrister?

I think most barristers live for the day where they have a great success at a hearing. It may be a cross-examination where you have shown the witness to be unreliable, unrealistic, or even untruthful. With submissions, it may be a difficult application that you win as a result of having a strong answer to all the counterarguments thrown at you by the other side and the tribunal. For me, it was this side of the work that led to me deciding to become a barrister rather than a solicitor.

The realities, I suppose, are all the hard work which you don't see that goes into achieving those results. Cross-examination is all about preparation. You need to know the contemporaneous documents in the bundle better than the witness does. With experts you also need a sufficiently good understanding of the technical side of the claim so that you can adapt to or counter any answer given. With submissions, it is about following up the right questions for legal research and then predicting the likely questions that will be thrown back at you by the tribunal. This is especially true of the Court of Appeal where, with three potential interrogators, you are likely to spend a lot more time answering questions than actually making uninterrupted submissions.

I sit part time as a Recorder in the criminal courts, and a lot of the advocacy there is rather more instinctive. The prosecution may have little warning of what the defendant will say, and many witnesses will give surprising answers or simply not come up to proof. The dominant skill lies in adapting to the answers being given and revising the next questions in order to probe at potential lines of enquiry.

Construction disputes are the polar opposite of that. Everything is in writing and anything which isn't supported by the documents tends to be treated with a degree of scepticism. Statements and reports are detailed and prepared far in advance. This gives you a firm bedrock for the preparation of any case and, whilst you need to be able to adapt and adjust to the unexpected, all successful construction barristers will tell you that preparation matters above all else.

What is your most memorable construction case?

I suspect most people would answer this question by referring to their most exciting trip to the Supreme Court or Court of Appeal, but for me the memorable cases are the trials and, indeed, the smaller trials from when I was a baby junior. In those sorts of cases, even a thousand pounds here or there means a lot to the parties, particularly if it will affect who pays the costs of the proceedings. It's great acting for large multi-national corporations in disputes over mega-projects, but I really enjoyed the personal aspect of those sorts of disputes early in my career.

There was one trial in particular that will always stick in my mind. I won't name the parties or the opponents, but it was at Central London County Court, back when it was located on Park Crescent, before HHJ Bailey who was the resident TCC judge back then. I was acting for the builder who was suing for unpaid work against a homeowner and every day brought a new issue which sometimes verged on the comical. One time a document was magically produced by my opponent from his bundle midway through cross-examination of his client. The document, which was not in anyone else's copy of the bundle, was unpaginated, not hole punched (but rather showed signs of having been forced over the lever arch prongs) and showed fresh biro indentations. It had all the hallmarks of a note of instruction from his client which was now being offered as a contemporaneous missing diary entry. Unsurprisingly, the Judge did not allow it in. Then there was the cross-examination of our surveying expert who was not tested on any of his evidence but instead simply asked to concede that facts are either true or false whereas opinions could legitimately differ.

Whilst it is, of course, far more civilised to be doing the high profile Court and arbitration work, I do somewhat miss the Wild West of the claims that I cut my teeth on back then.

If you could tell your younger self anything, what would it be?

When you've played yourself in, make the most of it and don't throw your wicket away.

There's no hidden meaning to that. I'd have given myself cricketing advice.

If you weren't a construction barrister, what would you be?

As you might be able to tell from the previous answer, I like to think I'd have been a professional cricketer. In truth, however, I was quite some way from that in terms of talent and I suspect it isn't a particularly rewarding career unless you are one of a handful of genuine stars. If I had my time again, I would quite like to have been an architect. There must be something intensely rewarding about seeing your own creation being erected, sometimes on a monumental scale, to form part of the built environment for years to come. But I suspect that in reality, I would have been a doctor. Having studied Science and Maths at A-level, I made a call between Medicine and Law at university and went with the latter.

GOVERNMENT BY CONTRACT: ISSUES FOR THE PRIVATE SECTOR

One of the features of the post 2019 landscape has been the increasing use of the law of contract to resolve significant policy issues facing government. Thus, the main government response to the Grenfell fire has been the creation of a series of Self Remediation Terms ("the SRTs") to which developers are, as a matter of contract, to agree or face being excluded from the development market by operation of the Responsible Actors Scheme.[1] Similarly on the rail network, the pandemic lead to first the Emergency Measures Agreement and then the Emergency Recovery Measures Agreement followed by the National Rail Contract ("the NRCs").[2] Such provisions are, of course, in addition to the government's already strong economic and commercial presence in the creation, maintenance and operation of infrastructure and large scale projects.

By Sean Wilken KC

1 See https://hansard.parliament.uk/Lords/2023-03-14/debates/10FB1D50-3CAF-4D1F-BDA3-AF1C73FE9F56/BuildingSafetyUpdate

2 See https://www.gov.uk/guidance/public-register-of-rail-passenger-contracts

This article does not address the wider questions of transparency and accountability that result from the use of contracts in this way.[3] Nor does this article consider how these activities fall within the procurement regime. This article is concerned with what legal scope there may be for any private sector response to "government by contract".

The first point to note is that initiatives like the SRTs and the NRCs are not directly underpinned by either statute or statutory instrument.[4] This means that there is little prospect of challenging such initiatives on the basis that a given initiative is ultra vires the enabling statute or statutory instrument and that the government lacked capacity to enter into the contract as a result.[5] These initiatives are instead created under the far more nebulous and difficult to challenge exercise of prerogative. The second point to note is once the contract is entered into, actions under that contract are not susceptible to judicial review.[6] Thus, a decision in relation to the construction industry's self-certification scheme was not reviewable as it was contractual.[7] The "standard" routes by which government policy may be challenged are therefore not available here. The third point to note is that these types of initiatives have consequences on parties who are not privy to the contractual relationship between the government and say a developer or a train operator. To take two examples: the SRTs allow for the government to seek to govern a developer's contractual relationships with third parties; the NRCs may also impact on the train operator's third party relationships with, say, the providers of rolling stock and other infrastructure.

In these circumstances, there are three routes by which government actions under a contract may be challenged:[8] by deploying public law doctrines to challenge the exercise of powers under the contract; by deployment of good faith obligations; and, finally, by use of competition law.

Deploying Public Law Doctrines

As a *Hazell*-type challenge to the entry into the contracts at issue is not possible, the sole challenge must be to the exercise of powers under the contract.[9] Whether public law doctrines may be used against a public body's exercise of powers under an otherwise valid contract was considered in detail by Foxton J in *School Facility Management Ltd v Governing Body of Christ the King College*[10], where after a lengthy review of the authorities, he concluded:

> *"I have concluded that a decision by the College to enter into a contract which the College did not have power to conclude would give rise to a private law defence of lack of contracting capacity. If, however, the College did have power to enter into contracts of the relevant type, but is alleged to have acted unlawfully in reaching its decision to contract, the consequence of such public law unlawfulness in private law will depend both on the nature of the unlawfulness, and on whether the counterparty had notice of the relevant breach of public law duty."*[11]

One route by which the deployment of public doctrines is now well recognised is by way of implied terms as to lawfulness, reasonableness and fairness – the so-called *Braganza* argument.[12] Thus, it can be said that if one party has acted capriciously, an implied term preventing such action will come into play.[13] The difficulty with that argument is it relies on a) there being a discretion and b) a term being capable of being implied. As to the first, as was recognised in *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*,[14] where a party has an absolute contractual right to do X, there is a simple decision whether or not to exercise that right and nothing on which the implied term can bite. Where, however, there is a nuanced decision involving the exercise of judgement, then the term may be implied. As to the second, the term will have to pass the requisite test for an implied term – in essence necessity based on the terms of the contract as a whole[15] and a recognition that such an implied term is interfering with the parties' freedom to contract.[16]

A further difficulty is how far a *Braganza*-type application of public law doctrines would go. As set out above, the extent of any public law type investigation would be driven by the context and the alleged unlawfulness. Thus, whilst Braganza may offer some comfort to the private sector, particularly when faced with a particularly extreme or unfair exercise of a discretion, it is not a complete answer.

Good faith obligations

In *Yam Seng PTE v International Trade Corp*,[17] Leggatt J (as he then was) stated:

> *"I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties."*[18]

3 Though undoubtedly there could be a lively debate on those issues.

4 They may be indirectly underpinned by statute and statutory instrument – see eg section 128 of the Building Safety Act which purports to give the Secretary of State powers to create the Responsible Actors Scheme by Statutory Instrument. The Responsible Actors Scheme is intended to exclude developers that do not sign up to the SRT from future development projects in England.

5 See Hazell v. London Borough of Hammersmith and Fulham [1992] 2 A.C. 1 for the classic example of this type of vires challenge to a statute

6 This has been the case since R v Criminal Injuries Compensation Board ex p Lain [1967] 2 QB 864 and as pithily expressed in R v Disciplinary Committee of the Jockey Club ex p Aga Khan [1993] 1 WLR 909 at 924C.

7 See R (Underwritten Warranty Co Ltd) v FENSA Ltd [2017] EWHC 2308 (Admin) at [42]

8 In extreme circumstance, duress may also be open to a private sector party.

9 See the distinction drawn by Lord Justice Browne-Wilkinson (as he then was) in Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1986] Ch 246 at p.302-304

10 [2020] EWHC 1118 (Comm)

11 At [162]. Foxton J went on to decide the case on the more traditional lack of vires and therefore of capacity to enter into the contract basis.

12 See Braganza v BP Shipping Ltd [2017] UKSC 17; Dymoke v Association for Dance Movement Psychotherapgy UK Ltd [2019] EWHC 94 (QB) at [60].

13 For a v recent articulation of this – see Palladian Partners LP & Ors v The Republic Of Argentina & Anor [2023] EWHC 711 (Comm) at [220]

14 [2013] EWCA Civ 200 at [83], [91] and [92]

15 See Equitas Insurance Limited v Municipal Mutual Insurance Limited [2019] EWCA Civ 718 at [113]

16 See TAQA Bratani Ltd v RockRose [2020] 2 Lloyd's Rep 64 at [53]

17 [2013] EWHC 111

18 At [131]

A category of contract where the presumed intention of the parties would be that there should be obligations of good faith was further said to be a "relational" contract.[19] These are contracts which:

> *"...may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements."*[20]

In *Bates v Post Office (No 3)*,[21] Mr Justice Fraser found there were nine requirements of such contracts:

1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
4. The parties will be committed to collaborating with one another in the performance of the contract.
5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
9. Exclusivity of the relationship may also be present.

The possibility of an implied term as to good faith has been accepted by the Court of Appeal with qualifications and a degree of cynicism. Thus, in *Compass*,[22] whilst Lord Justice Jackson accepted the term could be implied, the term would not apply to a simple decision whether or not to exercise an absolute contractual power. In *Candey Ltd v Bosheh*,[23] Lord Justice Coulson stated:

> *"there has been something of an avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Only a relatively few have succeeded."*[24]

Lord Justice Coulson then went on to adopt Lord Justice Beatson's views that a term could only be implied where it was consistent with the overall construction of the contract:

> *"... an implication of a duty of good faith will only be possible where the language of the contract viewed against its context permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."*[25]

Lord Justice Coulson then found that there was no implied term of good faith in the contract at issue (a retainer).

It follows that implying a term of good faith at least suffers the same issues as a *Braganza* implied term. In fact the Courts have qualified the implication of a term of good faith by holding that both the implication itself and the content of any implied term are very dependent on the context.[26] All of that has made the learned authors of *Chitty* somewhat sceptical as to the utility of the implied term of good faith.[27]

Added to the above difficulties with the implied term in theory, there is the difficulty with the implied term in practice. Given that it is the government contracting and therefore it is the government exercising public law powers, one can see (subject to there being no terms excluding implied terms) the scope for the implication of a *Braganza* type term. There is, however, more difficulty with a good faith term and for two reasons. First, assuming there were a *Braganza* type term, good faith would be subsumed into the public law doctrines being considered. Second, although contracts like the SRTs or the NRCs could be said to be long term, the imbalance of

19 At [142]
20 Yam Seng at [142]
21 [2019] EWHC 606 (QB) at [721 ff]
22 Op Cit
23 [2022] EWCA Civ 1103
24 At [31]
25 Candey Ltd at [32]
26 See cases summarised at Chitty on Contracts [2-088 – 90]
27 At [2-091]

contractual power and the wide ranging powers granted to the Secretary of State make it very difficult to categorise the contracts as *"relational"* or being permissible of a general contractual good faith obligation (other than in the context of a limited *Braganza* public law type of enquiry).

Competition law[28]

Obviously, what are at issue are contracts. Contracts tritely can attract a competition law scrutiny.[29] Further, an element of the initiatives is control of a party's ability to contract or to control the exercise of discretions under the contracts. Thus, in the SRT initiative, someone can be barred from participating in a market and if a developer does agree to the SRT, their contracts down the contractual chain can be controlled; under the NRCs, the DfT exercises the financial whip hand over the train operators and can then determine how they operate their contracts down the contractual chain. Manifestly that must affect trading conditions within the UK.[30]

It also can be relatively easily seen – even at a colloquial level – that there is a housing development market.[31] There are also markets in the provision of railway transport and then the provision of rolling stock and infrastructure. Further, developers, train operators and the providers of rolling stock are manifestly commercial undertakings operating in those markets. Given government's monopsonic status in terms of the developer market and in terms of control of the railways, the government would appear to be asserting market dominance over the private sector.

Thus, one can see the elements of an argument that there has been a breach of sections 2 and 18 of the Competition Act 1998.

The stumbling block to that argument was whether the government itself was acting as an undertaking engaging in economic activities so as to attract the provisions of the Competition Act. This question was answered by *Achilles Information Ltd v Network Rail Infrastructure Ltd* at least in relation to Network Rail.[32] The Competition Appeal Tribunal[33] and the Court of Appeal[34] held that when Network Rail entered into contracts with third parties, Network Rail was an undertaking carrying out economic activities even though part of that which Network Rail was doing was for the purposes of regulation and safety.[35] Thus, Network Rail was caught by the Competition Act and where Network Rail imposed terms and conditions there was a potential breach of section 18 of the Competition Act.[36]

There are analogies with both the SRTs and the NRCs. In both, terms are imposed on the counterparties and then down the line on parties that have or will contract with the counterparties. It would be reasonable to expect that the structure would be similar in further attempts to govern by contract. In that analysis, the fact that the arrangement did not owe its genesis to legislation would be a factor suggesting that all the parties to the arrangement were undertakings.[37] Thus, there could be similar issues over potential breaches of competition law in the way that government (via the contracting counterparties) was seeking to control contractual terms or the market.[38]

Conclusions

In governing by contract under the prerogative, it is possible to avoid the scrutiny of Parliament (the contracts do not have to be debated) and scrutiny by way of judicial review. Governing by contract brings, however, another set of perils – the rights and obligations that can flow from contractual activity and economic activity via contractual provisions. None of these arguments are straightforward but they are there if a private sector body were sufficiently aggrieved and minded to take them.

28 See Whish & Bailey Competition Law 10th Ed Ch 9 passim ("Whish")

29 Whish at pp 356 – 7

30 See s 2(2)(a). In the case of the SRTs, section 2(2)(e) may be relevant.

31 For the legal test – see Pfizer and Flynn v CMA [2018] CAT 11

32 [2019] CAT 20; [2020] EWCA Civ 323

33 At [99 ff]

34 At [54 ff]

35 The analogy with the regulation of rectification of developments for the purposes of safety is obvious.

36 See also UKRS Training v NSAR [2017] CAT 14

37 See Strident Publishing v Creative Scotland [2020] CAT 11

38 An obstacle to such arguments being made is an obvious unwillingness to challenge an economically dominant actor in a confined market. Thus, if government is the only end purchaser of a product or of a supply, there will be a manifest unwillingness to prejudice one's own economic interests by challenging government.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd [2023] EWCA Civ 292 (17 March 2023)

The appellants appealed the rejection of their application to dismiss the respondent's breach of contract claim due to non-compliance with a contractual dispute resolution procedure (DRP). The respondent had entered into a construction contract with the first appellant for it to carry out redevelopment works to a hospital. The second appellant had guaranteed contractual performance. The contract stated that no claims could be made against the appellants after 12 years from project completion. It also included a dispute resolution procedure (DRP) requiring referral to a liaison committee and, if unresolved, to the court.

The High Court had ruled that non-compliance with the DRP was a condition precedent, but had found the DRP unenforceable due to uncertainty. Even if it had been enforceable, the judge would have granted a stay of proceedings under CPR r.11(1)(b) instead of striking out the claim. The appellants argued that the judge had erred in deeming the DRP unenforceable, and in declining to strike out. The respondent revived an argument, not dealt with by the judge, that the claim against the second appellant should remain even if the claim against the first appellant were struck out, because the guarantee did not include the DRP.

The Court of Appeal dismissed the appeal, agreeing with the judge that the DRP was unenforceable. The argument that the condition precedent was limited to the making of the referral to the liaison committee was rejected. It would be wrong to assume that, if the only enforceable component of the DRP was the initial referral, the judge would have concluded that that was a condition precedent. Whilst the court had to endeavour to enforce the agreement between the parties, it should not overstrain to do so, so as to arrive at an artificial result.

The Court of Appeal clarified that a stay of proceedings was not automatically granted for non-compliance with a contractual dispute resolution mechanism. The right remedy would always turn on the facts of the case. The judge had used the expression "default remedy" simply as a shorthand to describe the usual order that would be made when proceedings were started in breach of a mandatory contractual dispute resolution mechanism, and in that respect she had been correct. The court also confirmed that the claim against the second appellant would not be struck out as the limitation defence applied only to relief sought against the first appellant, not the second.

Simon Hargreaves KC acted for the Appellants; William Webb acted for the Respondent.

Resource Recovery Solutions (Derbyshire) Ltd v Derbyshire County Council & Anor [2023] EWHC 708 (TCC) (28 March 2023)

A waste management company brought a claim against two local authorities, whom it alleged had terminated its contract prematurely. The local authorities sought summary judgment and requested that certain parts of the company's pleadings were struck out. The contract stated that early termination fees were to be determined by considering the "adjusted estimated fair value" of the contract, based on the costs forecasted to be incurred by the local authorities in performing the work to the "standard required". The parties disagreed on the interpretation of this clause. The company disputed that the matter was appropriate for summary judgment.

The court refused the applications for summary judgment. It held that the construction of the clause was uncertain, with both interpretations having reasonable prospects of success. The issue was not determinative of the entire claim, and the court considered that a trial was necessary to resolve the matter properly. Regarding the "standard required" for delivering the project, the court considered it a complex issue that required detailed investigation. Both parties' constructions had flaws, and the meaning of "standard required" could only be determined in the context of the factual and technical debate. Summary judgment was not appropriate for this issue.

Regarding the request to strike out parts of the company's pleadings, the court acknowledged some infelicities in drafting, but did not consider them significant enough to warrant a strike-out. The court emphasised the need for proportionality and practicality in such cases and found that the company's pleadings were not abusive. Therefore, the court decided against striking out any portions of the pleadings.

Paul Bury acted for the Claimant.

Avantage (Cheshire) Ltd & Ors v GB Building Solutions Ltd & Ors [2023] EWHC 802 (TCC) (05 April 2023)

In a damages claim arising from a fire at a retirement village, the court approved the claimants' request to replace the original forensic scientist expert due to serious illness. The claimants were not required to reveal the original expert's reports or opinions, but had to disclose her reports and notes of site inspections and interviews as they contained crucial information no longer available to other experts. The court also allowed the claimants to appoint a new fire engineer expert on the basis that they lacked confidence in the initial selection. The original engineer's reports, including drafts, and any other documents expressing his opinions on the matter would also have to be disclosed. Applications granted.

Charlie Thompson acted for the Second Defendant.

Planning appeal decision against the decision of Bristol City Council (Appeal Ref: APP/Z0116/W/22/3308537) (17 April 2023)

Planning Inspector Owen Woodwards BA (Hons) MA MRTPI allowed an appeal by Homes England in relation to a proposed 260 home development on an allocated site at Brislington Meadows in Bristol. Having sold the allocated site to Homes England, Bristol City Council decided to promote its de-allocation in their emerging local plan. Homes England's planning application was not determined within the statutory timescale.

An appeal against non-determination was opposed on several grounds, including most prominently an allegation that several veteran trees were present on site which (it was alleged) had been missed in the arboriculture surveys and whose removal was contrary to the allocation policy as well as NPPF para. 180(c) which provides that "development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists".

Other objections related to urban design, landscape and visual impact (including the allegation that the site despite its allocation was a valued landscape under NPPF para. 174(a)) hedgerows and ecology.

Allowing the appeal, the Inspector found that all the reasons for refusal were unsubstantiated by the Council's evidence at the inquiry, preferring instead the Appellant's evidence on the main points.

Charles Banner KC acted for the Appellant.

Sleaford Building Services Ltd v Isoplus Piping Systems Ltd [2023] EWHC 969 (TCC) (28 April 2023)

In consolidated proceedings, a subcontractor initiated a CPR Pt 7 action to enforce a favourable adjudication decision, while the contractor issued CPR Pt 8 proceedings seeking declaratory relief. The subcontractor was engaged by the contractor under an amended NEC3 Engineering and Construction Short Sub-contract, which included milestone payments. When a payment dispute arose, the matter was referred to adjudication, and the adjudicator ruled in favour of the subcontractor, directing the contractor to make a payment. However, the contractor did not comply and instead initiated Pt 8 proceedings, arguing that certain conditions precedent for payment were not met by the subcontractor. Subsequently, the subcontractor brought Pt 7 proceedings to enforce the adjudicator's decision, and the two sets of proceedings were consolidated.

The main issues were whether the contractor had a defence to the enforcement application (Pt 7) and whether the matters raised by the contractor were appropriate for determination through Pt 8 proceedings.

The court held in favour of the subcontractor's Pt 7 claim and outlined the following:

- Based on previous case law, the enforcement application (Pt 7) should be dealt with first, followed by the Pt 8 proceedings, to the extent possible (see also the commentary on paragraphs 9.4.3-9.4.5 of the TCC Guide).
- The matters raised by the contractor were not suitable for determination under Pt 8. They were complex and required evidence beyond what was available in the current court. The contractor's assertions regarding conditions precedent, non-compliance, and non-payment involved multiple sub-elements that needed separate resolution. The contractor had not adequately specified these elements or the alleged non-compliance, and any dispute regarding non-compliance would require resolution of factual issues. Moreover, the subcontractor argued that any breach had been waived, such that the contractor could not rely on any failure to comply with conditions precedent. Valuation evidence was also necessary to decide the contractor's claim of non-payment. Consequently, the court could not make a substantive determination on the matters raised by the Pt 8 claim. The appropriate course was to dismiss the Pt 8 claim and grant judgment to the subcontractor on its Pt 7 claim.

In the consequentials judgment handed down on 4 July 2023, the Part 8 Defendant/Part 7 Claimant was awarded its costs of the proceedings, with various points addressed in respect of indemnity costs and Part 36 offers ([2023] EWHC 1643 (TCC)).

Charlie Thompson appeared for the Part 8 Defendant/Part 7 Claimant

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Anor (Judgment No. 2) [2023] EWHC 1142 (TCC) (12 May 2023)

This judgment addressed several matters arising from the earlier decision in *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Anor* [2022] EWHC 3275 (TCC). M+W was contracted by EWH to construct an energy-from-waste plant, with Outotec as the subcontractor. Prior to the judgment in the first trial, M+W and its parent company entered into a settlement agreement with EWH to resolve the claims. This second judgment examined the impact of the settlement agreement on M+W's contribution claim; alleged defects in the works; M+W's defence of abatement against Outotec's counterclaim for overdue payments; and Outotec's claims for additional payment.

The court ruled that the settlement did not prevent M+W from pursuing its contribution claim. Since the settlement was reached after the trial and judgment, it was not appropriate to require M+W to prove its contribution claim based on the reasonableness of the settlement. M+W's contribution claim against Outotec amounted to £20,000.

Outotec had not established a separate contractual entitlement to the variations claimed, and these therefore failed.

The settlement did not prevent M+W from using the defence of abatement, but the defence failed due to lack of evidence, except for one instance. The court determined that the true measure of abatement was the reduction in value of the subcontract plant, which could be determined by considering the cost of remedial works. M+W failed to provide evidence of the market value, making it impossible to establish that the difference in value of the defective subcontract plant was necessarily greater than the claimed remedial costs. However, in relation to defect 28, the defence of abatement succeeded, resulting in a sum of £377,492.16.

The court considered how cl. 41.8 of the IChemE provisions for enhanced contractual interest operated in the context of claims for unpaid milestones and, albeit obiter, in respect of variations, where it ventured the tentative view that, upon a proper construction of the subcontract, enhanced interest could not be claimed upon variations.

William Webb KC and Thomas Saunders acted for the Defendant; Adrian Williamson KC and Paul Bury acted for the Third Party.

WHEN IS PUBLIC PROCUREMENT SUBJECT TO COMPETITION LAW?

By Simon Taylor

Contracting and procurement

The recent Keating article authored by Sean Wilken KC, *Government by Contract*, raises the interesting issue of whether contractual schemes such as the Self Remediation Terms imposed on developers by the Department for Levelling Up, Housing and Communities are subject to competition law scrutiny under the Competition Act 1998 (CA 98).

This article relates to an area of Government contracting which already attracts a considerable degree of scrutiny in the courts - public procurement. Contracting authorities and utilities subject to the Public Contracts Regulations 2015 (PCR 2015) and the Utilities Contracts Regulations 2016 (UCR 2016) are regularly sued for a failure to follow rules designed to ensure that procurement procedures comply with the principles of transparency, equal treatment and proportionality.

Typically, these cases relate to the way in which the process was conducted in challenges brought by unsuccessful tenderers. But occasionally, they also relate to the design of the tender rules and that may include often non-negotiable contractual terms.

For example, in *Abbvie Ltd v The NHS Commissioning Board* [2019] EWHC 61 (TCC) a challenge was brought both to the award criteria and to a contractual mechanism (Unmetered Access Model) by which a fixed fee would be payable to successful tenderers even though they may have to supply surplus treatments. The jurisdictional argument that the fixed fee was contractual and therefore not subject to the PCR 2015 was rejected at [151] on the basis that the relevant provisions in regulation 18 (the equal treatment principle) apply to the design of the procurement - of which the proposed conditions of contract are plainly a part.[1]

1 The definition of "procurement document" in regulation 3(1) expressly includes "proposed conditions of contract".

Given that terms are imposed on tenderers and Government/utilities often have a very high share of the buying market for the goods or services being procured, the question arises whether and to what extent competition law constrains or should constrain those contractual terms. Terms could include liquidated damages clauses, long term exclusivity and market sharing arrangements – all of which are potentially caught by competition law prohibitions.

This article considers briefly first, the outline differences between the regimes, second, why competition law has traditionally not been applied to public procurement and third, whether that is changing or could change in the post Brexit environment.

Differences between procurement and competition law

These regimes tackle different problems. Procurement law is a means of addressing the risk of corruption by public officials, the tendency of public bodies to prefer local or national suppliers and agreements reached in international treaties to secure reciprocal access for suppliers to public markets. The rules were based on the Treaty on the Functioning of the European Union (TFEU). Now, post Brexit, the UK is bound in its own right to the WTO General Procurement Agreement (GPA), has procurement commitments to the EU via the EU-UK Trade and Cooperation Agreement (TCA) and is also in the process of adopting new procurement legislation.

By contrast, competition law, though also mirrored in EU law and subject to ongoing international commitments under the TCA and WTO rules, is a means of ensuring that markets operate efficiently, fairly and for the benefit of consumers.

The scope for challenging contractual terms under competition law is broader than under procurement law and the remedies are more extensive.

Possible bases for challenging conditions of contract under the current procurement rules include the equal treatment principle and the regulation 18 requirement that the design of the procurement shall not be made with the intention of artificially narrowing competition. Technical specifications may also be challenged if imposed without allowing tenderers to use equivalent standards.[2] In general, the requirement for an advertised tender should ensure that there is some competition for the market, even if the contractual terms are dictated by the public buyer.

Competition law goes further as it prohibits (with certain exemptions and safe harbours) agreements which have the object or effect of preventing, restricting or distorting competition[3] (eg. by fixing prices in or sharing markets) and conduct by a dominant undertaking which amounts to an abuse[4] (eg. by imposing unfair prices or otherwise limiting production, markets or technical development to the prejudice of consumers without objective justification). Competition law applies to buyer as well as supplier markets and joint purchasing may cause competition concerns through 'oligopsony power' (ie. where the buyers jointly make up a significant share of demand).

Remedies in procurement cases can extend to setting aside decisions or ordering the authority to amend a document (before the contract is entered into), damages and a declaration of contractual (prospective) ineffectiveness in narrow circumstances (such as an unlawful direct award without publicity).

But competition law remedies are more coercive with the prospect of a contract being declared null and void, damages and even a fine of up to 10% of turnover in serious cases. The limitation period for procurement challenges is also shorter (30 days) than for competition cases (6 years).

A hybrid area is subsidy control, formerly known as state aid. Under EU law, this was a means of ensuring that member states did not distort competition by unfairly subsidising national providers, though there were myriad exceptions which allowed for a controlled industrial policy and aid to underdeveloped regions. Post Brexit, there continue to be reciprocal requirements under the TCA[5] and the Subsidy Control Act 2022 has been adopted in the UK giving the right to challenge non-compliant public subsidies to the Competition Appeal Tribunal (CAT).

EU state aid law has been invoked as a further weapon in procurement challenges on the basis that the failure to conduct a transparent and fair procurement procedure can amount to the grant of unlawful state aid.[6] There may continue to be a role under the Subsidy Control Act 2022 in considering the competition implications of public procurement.

These regulatory tools are not necessarily mutually exclusive. However, challenges to public procurements or procured contractual terms based on the CA 98 have been few and far between in the UK.[7]

There is a policy question as to whether a clearer and more extensive application of competition law principles to public procurement and Government contracting would be beneficial from an economic, political and social perspective in the UK. This article does not attempt to tackle that policy issue but takes stock as to where the law now stands and how it could evolve.[8]

Undertakings in competition law

The competition law prohibitions in section 2 and 18 of the CA 98 apply only to 'undertakings'.

Neither the EU Treaties nor the CA 98 define an undertaking. The definition has evolved through rulings of the Court of Justice of the EU. The Competition and Markets Authority (CMA) and UK courts have been required by section 60 of the CA 98 to ensure so far as possible that questions arising under the competition prohibitions in the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law.

2 Regulation 42, PCR 2015.

3 Section 2, CA 98.

4 Section 18, CA 98.

5 Articles 362 – 375.

6 See most recently *R (Good Law Project Limited) v The Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [407] – [497].

7 See *Arriva the Shires Ltd v London Luton Airport* [2014] EWHC 64 (Ch). While this case related to a tender for a bus route concession, the case was brought under the CA 98. The Defendant was held to be an undertaking within the meaning of the CA 98.

8 The reader is referred to a comprehensive and scholarly analysis of the legal and economic issues in *"Public Procurement and the EU Competition Rules, Second Edition"* by Albert Sanchez Graells, published by Bloomsbury, 2014.

An undertaking has been defined in the case-law as any natural person engaged in economic activity, regardless of its legal form or the way in which it is financed.[9] For public bodies, the *"basic test is whether the entity in question is engaged in an activity which consists in offering goods or services on a given market and which could, at least in principle, be carried out by a private operator in order to make profit."*[10] They are not undertakings when they perform essential functions of the state, such as social or regulatory functions.

The concept of an undertaking is functional so a public body could be acting as an undertaking for some activities but not others. In *FENIN*[11] which concerned the purchase of goods and services by the body which ran the Spanish health service (a free service), it was held that the nature of the purchasing activity (ie. whether it was economic) must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. In that case, the subsequent use was not economic and the authority did not therefore act as an undertaking.

Applying these EU tests, procurement by utilities caught by the UCR 2016 is arguably also caught by the CA 98. In *Achilles Information ltd v Network Rail Infrastructure Ltd* [2019] WL 038992580 and [2020] EWCA Civ 323, the CAT and Court of Appeal applied *FENIN* in finding that Network Rail's rules (requiring suppliers accessing the network infrastructure to use a certain provider of assurance services) were subject to the CA 98 on the basis that they were an essential part of and dissociable from its operation of the rail infrastructure. It appears to have been accepted that Network Rail's monopoly over the rail infrastructure was an economic activity and the argument that the activity in question was of a regulatory nature was rejected.

The procurement activity of certain public bodies caught by the PCR 2015 could also be subject to the CA 98 on the basis of *FENIN*. These might include universities, registered social providers and NHS Foundation Trusts, all of which engage in market-based activities.

In fact, post Brexit, the UK courts now have greater freedom to move away from the EU case-law constraints and expand the list of publicly funded bodies subject to competition law. In particular, section 60A of the CA 98 now provides that the CMA or courts (or other persons applying the CA 98) are not required to ensure consistency with EU law if the person:

> *"thinks that it is appropriate to act otherwise in the light of one or more of the following —*
>
> *(a) differences between the provisions of this Part under consideration and the corresponding provisions of EU law as those provisions of EU law had effect immediately before IP completion day;*
>
> *(b) differences between markets in the United Kingdom and markets in the European Union;*
>
> *(c) developments in forms of economic activity since the time when the principle or decision referred to in subsection (2)(b) was laid down or made;*
>
> *(d) generally accepted principles of competition analysis or the generally accepted application of such principles;*
>
> *(e) a principle laid down, or decision made, by the European Court on or after IP completion day;*
>
> *(f) the particular circumstances under consideration.*"

The door is therefore open for the courts to adopt a UK formulation of the threshold test for the application of competition law to bodies engaging in public procurement.

Changing procurement landscape

There is an equivalent opportunity following Brexit for the UK procurement regime to introduce new definitions of bodies subject to procurement regulation.

Currently, the definitions in clause 2 of the Procurement Bill allow room for interpretation and suggest an ongoing need for the overlapping application of the two regimes:

> *"public authority" means a person that is— (a) wholly or mainly funded out of public funds, or (b) subject to public authority oversight, and does not operate on a commercial basis"*

9 *Höfner and Elser* (C-41/90): [1991] E.C.R. I-1979 paragraph 21. See also *Bettercare Group Limited v The Director General of Fair Trading* [2002] CAT 7, in which it was held that an entity providing State funded residential care and nursing home services was acting as an undertaking and December 2011 Guidance of the Office of Fair Trading: Public bodies and competition law.

10 *Ambulanz Glöckner v Landkreis Südwestpfalz* EU:C:2001:284, [2001] E.C.R. I-8089. Applied by the CAT in *Strident Publishing Limited v Creative Scotland* [2020] CAT 11. See also *UKRS Training Limited v NSAR Limited* [2017] CAT 14 at [57] to [67].

11 C-205/03P FENIN v Commission EU: [2006] E.C.R. I-6295.

"The following are examples of factors to be taken into account in determining whether a person operates on a commercial basis—

(a) whether the person operates on the basis that its losses would be borne, or its continued operation secured, by a public authority (whether directly or indirectly);

(b) whether the person contracts on terms more favourable than those that might reasonably have been available to it had it not been associated with a public authority;

(c) whether the person operates on a market that is subject to fair and effective competition."

Conversely, a 'public undertaking', which is subject to the procurement rules only to the extent that it carries out a specified utility activity (in areas such as water or rail networks), is defined as *"a person that (a) is subject to public authority oversight, and (b) operates on a commercial basis"*.

The draft definition of a public authority has similarities to that used under the PCR 2015 and interpreted by the UK (and EU) caselaw.[12] However, it is not the same as it moves away from a test based on the purpose for which the body is established towards a test based on its activity. It is unclear whether it is intended to apply to buyer as well as provider markets. It is also unclear whether it means that a person could be considered a public authority for some (purely social) purchases, but not others (commercial purchases).

The definition appears to envisage the unfortunate but possibly familiar scenario in which a state supported body operates on the market with an unfair advantage and thus distorts effective competition. That body would be subject to procurement regulation as a public authority. Clearly, the need for competition regulation of its activities is also all the greater given its advantages and it may be assumed that it would also be considered an undertaking, possibly a dominant one. If the state-controlled body operates on a competitive market without any unfair advantage it would be treated as a public undertaking; though it is difficult to see how such a body would ever be subject to the procurement rules given that competitive utility markets are excluded from regulation.[13]

Finally, it is noted that the Procurement Bill provides less scope for the sort of challenge brought in *Abbvie*. In particular, there is no direct equivalent in the Procurement Bill of the regulation 18 prohibition on intentionally designing the procurement to artificially narrow competition.

A legislative solution

The Subsidy Control Act 2022 defines a "public authority" in Section 6 as "a person who exercises functions of a public nature". It might have been simpler if the same definition of a public authority had been used in the Procurement Bill or an improved version which limited it to bodies which exercise exclusively functions of a public nature and do not offer goods or services on a market. CA 98 could then be amended to ensure that all bodies not within this definition are treated as undertakings. That might more clearly take certain categories of body outside the remit of procurement law (e.g. universities, registered social providers, NHS Foundation Trusts, possibly certain arms' length Government bodies)[14] but these bodies would be subject to the full rigour of the CA 98. This might achieve a degree of mutual exclusivity, though utilities would continue to be subject to both regimes.

The case law options

As explained above, the current and draft legislation do, not separate out the application of procurement and competition law.

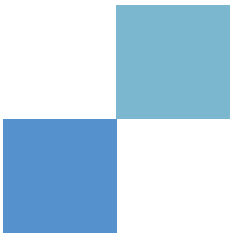
Assuming no further relevant changes to the definitions in the Procurement Bill or other legislation, there appear to be two roads that the UK case law in this area could take, now that the courts are relatively unconstrained by EU rules in this area.

The first, 'the hybrid road', is that there will continue to be a limited overlap between procurement and competition law, in that competition law will only apply to public procurement needed for market based activity under a *FENIN* type analysis or similar. Utilities and state supported public bodies, such as Foundation Trusts, central purchasing bodies, some 'arms' length' Government bodies, registered social providers and universities may continue to be subject to scrutiny under both regimes.

The second, 'the radical road', would be if the courts were to conclude that any major public procurement and contracting is in essence a commercial activity with a potential risk to fair and effective competition and that both procurement and competition law should apply, providing complementary relief. On this approach, Government departments designing and conducting procurements would also need to consider the competition law rules and this could restrict their ability to use procurement to make or shape markets or promote market entry. There will be limited tools under the Procurement Bill to vet this kind of market manipulation, particularly given that regulation 18 of the PCR 2015 is being dropped.

Conclusion

The interface between competition and procurement law remains unresolved. The current definitions under the CA 98 and the Procurement Bill sit alongside each other uneasily and the rules may need to be determined by litigation rather than legislation. This leaves public bodies and utilities in an uncertain position. In the meantime, it may be prudent for public bodies, as well as utilities, to ensure that all tender documents and proposed contractual terms are vetted for competition law considerations before being issued to tenderers.



12 In particular bodies *"established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character"*, as interpreted in cases such as Korhonen Oy (Case C-18/01) and, in the UK, *Alstom Transport v Eurostar International Limited* [2012] EWHC 28 (Ch).

13 See regulation 34 of the UCR 2016, clause 2(1) and Schedule 4, Part 2 of the Procurement Bill.

14 This would require modifications to the UK GPA coverage Annexes.

THOMAS SAUNDERS Q&A

Thomas has a busy practice across Chambers' specialisms including construction, energy, procurement and professional negligence. He represents his clients at all stages of the litigation process and is well-versed in advocating for them in court both as sole counsel and as a valuable member of larger counsel teams. Thomas has been instructed on several complex legal matters, including Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd, in which judgments were handed down in December 2022 and May 2023.

Since being called to the Bar in 2019, your practice has flourished and become more diverse. Is there a specific area within your practice that you enjoy the most?

I honestly think the variety is my favourite part. Right now, I'm going from being very busy on an international arbitration about a solar power plant (with another member of Chambers and a silk from another set) to being very busy on a TCC case stretching back 20 years arising out of a PFI contract (with two other members of Chambers). In between, I've also managed to squeeze in advice, pleadings and an adjudication enforcement hearing in my own right as well as helping out with the upcoming new edition of *Keating on Offshore Construction and Marine Engineering Contracts.*

That said, if I had to choose just one element of the work, it would have to be the court-based oral advocacy. That is the most exciting part, and everything else is ultimately informed by how it will play out in that arena.

What is a typical day like for you?

It very much depends on what my balance of work is looking like at the moment. Unless I have a hearing, I tend to spend about three days a week in Chambers and work the other two at home. I could spend the whole day with my head down on a big case, but I'm much more likely to be spread between a handful of different matters, including dealing with emails and phone calls from solicitors, counsel and opponents. If I'm working in Chambers, I'll probably take the opportunity to pick someone's brain over a cup of tea or lunch in Middle Temple Hall.

What has been the highlight of your practice so far at Keating?

The five-week trial in *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd* – even though it took place during Covid-19, which meant that I could only spend a limited amount of time actually in the court – was a fantastic experience. I was part of a team of four, including Will Webb KC (before he took silk), and it was a three-party case, which meant that I got to see a really interesting mixture of styles and approaches both to running and preparing a case and to advocacy.

Otherwise, the highlight is always the most recent success – whether that's a win in court or a pleading I think turned out well – and the anticipation of the next one.

What's one thing that surprised you about being a barrister, that you didn't know before you were called to the Bar?

It's not so much about the day-to-day practice, but one thing I didn't know is that, after the new silks have been sworn in at Westminster Hall, there is a smaller ceremony in front of all the TCC judges for the new construction silks. Unlike the main swearing in, other barristers can attend. It's a rare opportunity (for the construction Bar) to wear the wig and gown, and more importantly a chance to congratulate people you might have worked with or know socially.

What do you enjoy doing in your spare time, outside of Chambers?

I like to stay physically active. I particularly love playing rugby, although I'm not always very disciplined about getting to training every week. I also started taking ballroom lessons recently, which is a new sort of skill for me and not one I have any natural talent for, but something I'm really enjoying. Other than that, I like to read – it can be difficult to keep up a steady habit of reading fiction when you spend most of the day reading legal documents or technical records, but I generally have something on the go for the Tube or the evenings. When I can, I try to do some reading in Danish to improve my comprehension, but I still find it quite slow going.

If you could describe Keating in one word, what would it be and why?

Supportive. People are always genuinely interested in how you're doing and what you're working on, and happy to take time out of their day to act as a sounding board or talk through a knotty point. As a junior member of Chambers, it's absolutely invaluable.

LIMITATION AND ADJUDICATION: REVISITING THE DEBATE FOLLOWING LJR INTERIORS LTD V COOPER CONSTRUCTION LTD [2023] EWHC 3339 (TCC)

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The question of whether limitation applies to adjudication has long been a source of academic debate. The consensus would seem to be that limitation does (or must) apply to adjudication (eventually) but it is not clear how or when.

There were earlier passing, obiter, statements by the Court that adjudication was subject to limitation in *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC) and *Connex South Eastern Limited v M J Building Services Group Plc* [2005] EWCA Civ 193.

However, the recent Judgment of the TCC in *LJR Interiors Ltd v Cooper Construction Ltd* [2023] EWHC 3339 (TCC) was the first time that this question was properly considered by the Court. HHJ Russen KC (sitting as a judge of the High Court) held that an adjudication was an "action" for the purposes of the Limitation Act 1980.

In this article we will consider:

1. The reasoning in *LJR*.
2. Lessons which can be learnt from the (historic) approach to arbitration.
3. Whether the commencement of adjudication interrupts the limitation period for other purposes.
4. The consequences of our analysis for future adjudications and enforcements.

1. Reasoning in LJR

The Limitation Act 1980 prevents an *"action"* being brought when the relevant limitation periods have expired. Section 38(1) provides that "action" "includes any proceeding in a court of law, including an ecclesiastical court (and see subsection (11) below)". These definitions are subject to an introductory proviso: they apply *"unless the context otherwise requires–..."*

Subsection (11) provides further clarity on what is not an "action":

> *"References in this Act to an action do not include any method of recovery of a sum recoverable under—*
>
> *(a) Part 3 of the Social Security Administration Act 1992,*
>
> *(b) section 127(c) of the Social Security Contributions and Benefits Act 1992, or*
>
> *(c) Part 1 of the Tax Credits Act 2002,*
>
> *other than a proceeding in a court of law."*

An adjudication is not a proceeding in a court of law. Nor is an arbitration. However, section 13 of the Arbitration Act 1996 deals with this lacuna: *"The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings."* It might be said that the debate around adjudication stems from the fact that there was not a similar provision in the Housing Grants, Construction and Regeneration Act 1996 (**"HGCRA"**).

This problem was recognised by the Judge in *LJR*, stating at para. [61] that *"an adjudication might not fall within the definition of an "action"."* Nevertheless, he ultimately concluded at para [69] that *"the context does require the term "action" in the non-exhaustive definition provided by section 38 of the 1980 Act to be read as including adjudication proceedings."*

With respect to the Judge (and noting that, as identified at para. [15] of the judgment, his conclusions and reasoning were not the subject of proper adversarial legal argument), his reasoning is (at least) open to question:

1. He described section 38(1) of the Limitation Act 1980 as providing a *"non-exhaustive"* definition of "action". It is correct that section 38(1) provides that "action" "*includes* any proceeding in a court of law..." (emphasis added). It does not follow that the word *"action"* can include any other form of dispute resolution. In order to understand the true effect of section 38(1), the starting point is that "action" is a legal term of art. *"The primary sense of 'action' as a term of legal art is the invocation of the jurisdiction of the court by writ, 'proceeding' the invocation of the jurisdiction of a court by process other*

than writ": *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437, 1446. The effect of section 38(1) is therefore to sweep away (for limitation purposes) fine and technical distinctions such as the difference between *"action"* and *"proceeding"* as expressed in *Herbert Berry*, as well as to make it clear that an ecclesiastical court counts as a "court of law" for these purposes. Nothing in the "non-exhaustive" extent of section 38(1) detracts from the principle that the proceeding in question must still be taking place in a court in order to be an *"action"*.

2. In *Braceforce Warehousing Ltd v Mediterranean Shipping Company (UK) Ltd* [2009] EWHC 3839 (QB), the parties had apparently been of the shared view that the Limitation Act 1980 applied to an expert determination. Ramsey J remarked (but did not need to decide) that this *"does not seem to be correct"*, presumably on the basis that an expert determination is not an *"action"*: para. [16]. This observation was not cited in *LJR*. It was cited with approval (albeit still obiter) in the even more recent case of *Bastholm v Peveril Securities (Dalton Park Retail Ltd* [2023] EWHC 438 (Ch) at para [222]. Neither of these cases discussed the arbitration cases referred to below.

3. The interpretation in *LJR* was largely driven by the *"context"*: para. [69]. This appears to be a reference to the introductory proviso to the definitions in section 38(1). However,

    a. This appears to be a misuse of the *"unless the context otherwise requires"* proviso. That proviso is *"a standard device to spare the drafter the embarrassment of having overlooked a differential usage somewhere in his text" (Secretary of State for Work & Pensions v M* [2004] EWCA Civ 1343, [2006] QB 380, para. [84]). It is intended to capture the scenario where some specific use of the defined term diverges from the overarching definition because of the context of that specific use. It is not intended to redraw the underlying definition for all purposes. (Indeed, *Bennion*, Bailey and *Norbury on Statutory Interpretation* (8th edn.) observes at section 18.8 that the use of such a proviso is redundant.)

    b. Moving beyond that proviso, context can be a legitimate aid to statutory interpretation. However, as a matter of legal principle, the starting point is for the Court to interpret Parliament's intent from the language used. If the words used have a clear and unequivocal meaning (which, as set out above, it is submitted that they do), then the Court should be slow to reach a different meaning based on wider context.

    c. Statutory construction adjudication of course did not exist at the time the Limitation Act 1980 was passed. It is difficult to see how it could form part of the 'context' so as to inform the interpretation of that Act.

4. Beyond the common-sense starting point (discussed further below) that adjudication should not be a vehicle to subvert limitation, the *"context"* relied on in *LJR* was provisions of the Scheme. There are two potential problems.

    a. The Scheme does not apply to all adjudications. Part I of the Schedule to the Scheme contains default provisions on adjudication which apply if, and only if, a construction contract does not comply with sections 108(1) to (4) of the HGCRA.

    b. The three provisions of the Scheme identified were paras. [12], [20] and [23(2)]. The latter two[1] cannot be said to make adjudication subject to limitation. Only on the former, could such an argument be made: *"The adjudicator shall —...reach his decision in accordance with the applicable law in relation to the contract"*. The argument would be that the Limitation Act 1980 is part of the applicable law. This is touched on below, but the problem in short is that the argument appears to be circular: even if the Limitation Act 1980 is part of the applicable law, the question is whether under that applicable law an adjudication is an *"action"*, which (for the reasons given above) it is not.

5. While it is correct that the Limitation Act 1980 would apply to legal proceedings or arbitration that is because of the express words of the Limitation Act and the Arbitration Act 1996.

The alternative answer put forward in *LJR*, at para. [70], was that the Limitation Act 1980 must bite on a Part 8 claim to meet the enforcement proceedings because that is an action. The Part 8 claim would meet the test of proceedings in a court of law. However, the problem with this analysis is the mismatch between the "action" identified as engaging the Limitation Act 1980 and the "action" which it is seeking to bar (as that is the effect of the Act). The two actions must be the same. The Part 8 cannot therefore assist the defendant as the only action it could engage the Limitation Act to bar would be the Part 8 itself.

If the Court had in mind the enforcement proceedings as the action, then that approach would, normally, fail on the question of whether the limitation period has expired. It is now well established that the enforcement of an adjudicator's decision is based on an obligation to comply with the decision (which will be implied if it is not express), rather than the underlying obligation subject to the adjudicator's decision: *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38. The cause of action in the enforcement proceedings therefore accrues on the date of the decision, meaning it cannot be said that the limitation period for that cause of action has expired.

In summary, while the ultimate answer in *LJR* may be thought to be correct, the reasoning appears to be wrong, in that the judge ends up saying that the Limitation Act 1980 applies in terms to adjudication proceedings.

The question, therefore, is whether there is any alternative analysis which reaches the same result.

1 *Paragraph 20 "The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute."*

Paragraph 23(2) "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

2. A look back: lessons from arbitration

We have identified at least one alternative route to the same conclusion which has the support of a string of historical arbitration cases.[2]

As mentioned above, section 13 of the Arbitration Act 1996 provides for the Limitation Acts to apply to arbitral proceedings *"as they apply to legal proceedings"*. This is the statutory successor of (in reverse chronological order) section 34 of the Limitation Act 1980; section 27 of the Limitation Act 1939; and section 16 of the Arbitration Act 1934. Before that point, however, no such provision existed, and the courts were required to grapple with the question of whether, and if so on what basis, the terms of limitation statutes applied to arbitrations.

The arbitration cases

That question was touched on in a number of cases in the late nineteenth and early twentieth centuries:

- *In re Astley and Tyldesley Coal and Salt Company* and the Tyldesley Coal Company (1899) 68 LJ (QB) 252, 80 LT 116.
- *Cayzer, Irvine & Co v Board of Trade* [1927] 1 KB 269 and [1927] AC 610.
- *Ramdutt Ramkissendass v E D Sassoon & Co* [1929] WN 27 (PC), 56 Ind App 128.

It was finally answered in the affirmative by the House of Lords in *NV Handels en Transport Maatschappij "Vulcaan" v J Ludwig Mowinckels Rederi* A/S [1938] 2 All ER 152 (HL), (1938) 60 Ll L Rep 217 (HL); (1937) 57 Ll L Rep 69 (CA); (1936) 54 Ll L Rep 324.

By way of brief overview:

- The *Astley* case concerned a dispute between two adjoining mineowners, which they agreed to submit to arbitration. It does not appear to have been argued as such that an arbitration was not an "action",[3] but instead that the agreement to arbitrate amounted (on the facts) to a *"fresh promise to pay whatever damages the arbitrator shall find"* and so displaced the Limitation Act 1623. The Divisional Court rejected that argument, holding instead that if the parties intended to exclude limitation, there should have been express provision to that effect.
- The *Cayzer* case concerned the loss of a ship requisitioned during the First World War on a charterparty which provided for arbitration. The arbitration clause was in *Scott v Avery* form – in other words, it prevented any cause of action from accruing until after the arbitrator's award had been made. As a result, the actual basis of the decision was that time did not even start to run until after the award (and so the plea of limitation failed in any event).[4]
  - Most of the judges who expressed a view (Rowlatt J at first instance; Romer J in the Court of Appeal; Viscount Cave LC and Lord Phillimore in the House of Lords) supported the view that limitation would ordinarily apply to arbitration, or at least were prepared to assume that this was correct. Viscount Cave LC said that he was *"far from wishing to throw doubt"* on the *"commonly held"* view that *"an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation"*, albeit he declined to express a final opinion.
  - However, Scrutton LJ expressed more doubts. He said that the question was a *"very difficult one"*, which *"has not yet been properly considered"* and was *"probably one which does not admit of an absolute rule being laid down applicable to all arbitrations"*. He was *"very doubtful"* that such a term was *"so necessary and so obvious"* that it could be implied.
- In the *Ramdutt* case (which concerned the Indian Limitation Act), the Privy Council referred to the judgments in *Astley* and *Cayzer* and concluded that the law was correctly stated in *Astley*:

  "Although the Indian Limitation Act does not in terms apply to arbitrations, they [i.e. their Lordships of the Privy Council] *think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law can be equally proponed for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence."*

  This again treated the matter as one of interpretation of, or implication into, the parties' arbitration agreement, and focused expressly on *"mercantile"* references.

When the matter arose in the *Vulcaan* case, therefore, the tenor of the authorities was clear that the Statute of Limitations could not literally apply to an arbitration, but nevertheless was generally in favour of applying its provisions (at least in ordinary mercantile or commercial arbitrations where legal rights fell to be determined), on the basis that a term to that effect should generally be implied into the arbitration agreement.

2 We are indebted to the editors of *Kendall on Expert Determination* for drawing attention to this line of cases in chapter 12 of the fifth edition.

3 This point was picked up in argument for the claimants at first instance in the *Cayzer* case. If the point was taken, the report of the case at 80 LT 116 indicates that Bruce LJ gave it short shrift.

4 In this respect, the decision has been reversed by section 13(3) of the Arbitration Act 1996 and its statutory predecessors referred to above.

The exception was the view of Scrutton LJ in *Cayzer*, who had doubted whether such a term met the test for implication. It may be worth recalling that it was Scrutton LJ who, in *Reigate v Union Manufacturing Co* [1918] 1 KB 592, 605, had said that a term would only be implied:

"if it is such a term that it can be confidently said that if at the time the contract was being negotiated someone had said to the parties 'What will happen in such a case?', they would have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'"

The broad effect of the *Vulcaan* case was to endorse the position as stated in *Ramdutt*, and as supported by Viscount Cave LC in *Cayzer*: that, as a general rule, in an ordinary commercial or other legal arbitration, it would be an implied term of the arbitration agreement that limitation defences would be available in the same way as they would have been in court.

However, *Vulcaan* also introduced an alternative or parallel line of reasoning (put forward by Lord Wright MR in the Court of Appeal and adopted by Lord Maugham LC in the House of Lords). This went as follows:

- Before the merger of law and equity by the Judicature Acts 1873 and 1875, proceedings in the courts of equity were by way of "suit", and not by way of "action". The Statutes of Limitation had not applied literally to such proceedings.
- Nevertheless, the courts of equity had applied the Statutes of Limitation by analogy where (for example) the validity of a legal debt arose.
- An arbitrator was required to apply both law and equity, and so to apply the Statutes of Limitation by analogy in the same way.

By the time of the decision in *Vulcaan*, section 16 of the Arbitration Act 1934 (referred to above) had come into effect, rendering the matter of historical interest only in the arbitration context. It is therefore to be regarded as the final word on the subject.

Where does that leave us now?

The question then arises: what does this historical digression on the position in relation to arbitration mean for adjudication?

The first point is that it confirms the view (as set out above) that the Limitation Act does not literally or directly apply to adjudications (and, accordingly, that insofar as the reasoning in *LJR* says otherwise, that reasoning is not correct).

The second point is that the courts have never been averse to stretching a point in order to avoid the conclusion that limitation statutes simply do not apply. In that respect, while the reasoning may be subject to criticism, the actual result in *LJR* is not out of step with history.

The third point is whether either or both of the *Vulcaan* justifications (the 'implied term' approach and the 'equitable analogy' approach) can be applied to adjudications.

At first glance, there are some obvious difficulties with applying the implied term approach to adjudication, where that adjudication is governed by the HGCRA and / or the Scheme. It is significantly harder to imply a term into a statute or statutory instrument than it is to imply a term into a commercial contract (though not impossible). In particular, where the HGCRA applies, it might be difficult to read much into the 'shared intentions' of the parties as far as their adjudication agreements are concerned – especially if they have failed to make any (compliant) agreement and have been thrown back on the Scheme by statutory implication.

Having said that, there are in fact cases in which the courts have found implied terms governing adjudications (whether there is an express adjudication agreement or the statutory implication of the Scheme). By way of example:

- Before the HGCRA and the Scheme were amended to make provision for a slip rule, it was held that there was an implied slip rule in any event: *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Limited* [2000] BLR 314; *YCMS Ltd v Grabiner* [2009] BLR 211; *O'Donnell Developments Ltd v Build Ability Ltd* [2009] EWHC 3388 (TCC).
- There is an implied (if not express) obligation to comply with an adjudicator's decision: *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, and *Keating on Construction Contracts* (11th edn), para. 18-066.
- There is also an implied right for a party which is unsuccessful in adjudication to have money repaid if the dispute is finally determined in its favour: *Aspect v Higgins*.

It might be said that the implication of limitation provisions takes matters a step further than those cases. Nevertheless, for all the reasons given in the arbitration cases, it seems likely that such a term can be implied as a corollary of the (express or implied) adjudication provisions in a construction contract.

Where the Scheme applies, there is (as the judge noted at para. [68] of *LJR*) an express requirement that the adjudicator: *"shall reach his decision in accordance with the applicable law in relation to the contract"*.

On one view, it is begging the question to suggest that this supports the application of the Limitation Act to adjudications: if the law is that limitation applies to actions, then (by definition) it does not fall to be applied during an adjudication. Equally, the *"applicable law"* would ordinarily be read as meaning the applicable substantive law, which does not include a procedural statute governing the remedy and not the right. On the other hand, in the arbitration cases, there are several remarks which support the view that giving effect to limitation, and deciding the matter in the same way a judge would, is part and parcel of deciding the matter in accordance with the applicable law.

Finally, there appears to be no obstacle to saying that an adjudicator should apply the principles of equity in the way described by Lord Wright MR and Lord Maugham LC, so as to allow him or her to apply the Limitation Act 1980 by analogy if need be. However, if the implied term analysis is correct, this alternative analysis is unnecessary.

3. Adjudication and the stopping of time

If the Limitation Act 1980 is to be applied to adjudication, what is the date at which time stops running? In *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC), Carr J (as she then was) held that an adjudication was 'commenced' for the purposes of a contractual provision when the notice of intention to refer a dispute to adjudication was given. It is likely that the same approach would apply for limitation purposes.

The follow up question is: what proceedings is time stopped for? In particular, is time stopped just for the adjudication or is it also stopped for subsequent Court or Arbitration proceedings?[5]

In general, the stopping of time is likely only to apply to the adjudication, which is a separate process from any court proceedings or arbitration. Any other interpretation would be unworkable where there is no time limit to when a subsequent arbitration or court proceeding must be brought following the adjudication. Even if there were such a time limit (for example, a requirement in the contract to bring any court proceedings within 28 days of the adjudicator's decision), the Limitation Act would fall to be applied afresh to those proceedings. The remedy for a referring party who is near the end of the limitation period is to issue protective proceedings as well as commencing an adjudication.

This position is in accordance with the, apparently correct, principle that if a party commences an adjudication but only succeeds in part, the limitation period if it wanted to pursue the remainder of its claim which was unsuccessful is unaffected by the adjudication and runs from when the original cause of action accrued: see *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, para. [27].

It may be that a different view could be taken if there is a tiered dispute resolution clause, where each prior step is an impediment to pursuing the claim in arbitration or Court and there are precise time limits between each step. These clauses are increasingly popular, particularly in the FIDIC form. Conceptually, there is an argument that the earlier tiers/steps are part of the overall Court or Arbitration action. That is the approach taken in South Africa. In *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* (1984) (1) All SA 571 (A), there was a tiered dispute resolution clause leading to Court. The first step was for a dispute to be referred to the engineer appointed under the contract. The contract was terminated in 1976. On 7 June 1978, the dispute as to the validity of the termination was referred to the engineer. However, he did not make a decision until April 1980. By that point the 3 year primary limitation (or prescription) period in South Africa had passed since the date of the termination. The South African Court at first instance and on appeal held that the claim was not time barred because the submission of the claim to the engineer meant that it was *"a dispute subjected to arbitration"* for the purposes of section 13(1)(f) of the Prescription Act No. 68 of 1969, thereby delaying the completion of the limitation period.

5 We are grateful to Douglas Simpson at LexisNexis for raising this interesting question for our consideration, as well as his assistance in commissioning, editing and formatting the original version of this article.

The only equivalent to section 13(1)(f) in English law is section 33B of the Limitation Act 1980. This states as follows:

> *"(2) Subsection (3) applies where—*
>
> *(a) a time limit under this Act relates to the subject of the whole or part of a relevant dispute;*
>
> *(b) a non-binding ADR procedure in relation to the relevant dispute starts before the time limit expires; and*
>
> *(c) if not extended by this section, the time limit would expire before the non-binding ADR procedure ends or less than eight weeks after it ends.*
>
> *(3) For the purposes of initiating judicial proceedings, the time limit expires instead at the end of eight weeks after the non-binding ADR procedure ends (subject to subsection (4)).*"

There are two preliminary points to note here (1) the non-binding ADR procedure must be started before the limitation period expires, and (2) the understanding of Parliament is that the non-binding ADR procedure would not otherwise stop time running.

However, other than potentially impacting how the other provisions are to be interpreted, section 33B is unlikely ever to apply to a construction adjudication:

- A *"relevant dispute"* must be between a trader and a consumer. Almost all construction adjudications take place between two traders.
- Adjudication is unlikely to satisfy the definition of a *"non-binding ADR procedure"* – *"an ADR procedure the outcome of which is not binding on the parties"* – although the interim nature of an adjudicator's decision may give rise to an interesting debate on this point.
- An *"ADR procedure"* must be a procedure provided by the intervention of an approved *"ADR entity"* under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. None of the *"competent authorities"* listed in Schedule 1 to those regulations have anything to do with the construction industry, and (to the authors' knowledge) none of the approved ADR entities under those regulations are adjudicator nominating bodies.

Ultimately, the more likely safeguard under English law to prevent compliance with a multi-tiered dispute resolution clause impacting a party's ability to issue proceedings within the limitation period is that the Court claim, or arbitration[6], could be commenced but would then be stayed unless and until the prior steps are complied with – *Ohpen v Invesco* [2019] EWHC 2246; *Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd* [2023] EWCA Civ 292.

4. Concluding thoughts

As explained above, there are good reasons to consider that *LJR* is wrong to say that an adjudication is an *"action"* subject to the Limitation Act 1980. There is, however, an alternative analysis which reaches the same conclusion without running into the same difficulties, and which has the support of a series of arbitration cases from the late nineteenth and early twentieth centuries. That better view is that the relevant provisions of the Limitation Act apply by way of an implied term in the parties' adjudication agreement (and / or because the adjudicator is required to apply them by analogy in accordance with the historical approach of a court of equity), as was held to be the analysis in respect of arbitrations before the Arbitration Act 1934. This accords with the view which both lawyers and businesspeople would probably share, that a party with a time-barred claim should not in practical terms be able to circumvent limitation by pursuing its claim in adjudication.

The effect of that analysis is that an adjudicator who fails to consider a properly raised limitation defence on the basis that adjudication is not an "action" is very likely to commit a breach of natural justice rendering any decision unenforceable: *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC), 130 Con LR 90.

On the other hand, if the adjudicator does consider the question of limitation, his decision on that point is likely to be binding on the parties in the usual way, unless it can be challenged as obviously wrong by way of a Part 8 claim. As a matter of first principles:

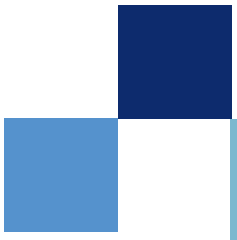
a. Whether a claim is time-barred is a question of fact or law.

b. Whether a decision by an adjudicator on a such a question (including whether the Limitation Act 1980 applies in the first place) was right or wrong is irrelevant on enforcement.

c. The unsuccessful party should comply with the decision and then bring Court proceedings seeking to overturn it (pay now, argue later).

These principles were recognised in *LJR* where the Court approached the issue of limitation – with (understandable[7]) hesitation – under the narrow exception in *Hutton v Wilson* for points of law which can be finally determined on enforcement. If such a claim is permissible, it would have to be based on a submission that the cause of action was time barred at the time when the dispute was submitted to the adjudicator, not at some later date such as the commencement of enforcement proceedings or of the Part 8 claim itself. It is clear from the guidance in *Hutton v Wilson* that the issue must have arisen in the adjudication itself.

The best answer, ultimately, may be for Parliament to amend either the Limitation Act 1980 or the HGCRA to clarify that adjudication[8] is to be considered an action – or, at least, that the Limitation Act is to apply to adjudications in the same way as it does to actions and arbitrations. In the interim, however, *LJR* reaches what appears to be the correct practical answer, albeit for the wrong reasons; and the analysis in the arbitration cases offers historical support for that conclusion, albeit by a different analytical route.



6 There is a debate in arbitration as to whether the failure to comply with earlier steps would deprive the tribunal of jurisdiction. That debate is outside the scope of this article. There was a recent discussion of this topic in which a requirement to wait until a settlement period had expired before commencing an arbitration was held to go to admissibility not jurisdiction: *The Republic of Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm).

7 Given that the Judge accepted at para. [116] that limitation issues raised by the Part 8 *"could not be properly aired and fairly decided within the expedited 90 minute hearing initially set aside for the summary judgment application"*, there is a reasonable argument that it did not meet the *Hutton v Wilson* guidance. Certainly, it is unusual for an issue which required two hearings with further evidence and submissions to be regarded as a *"short and self-contained issue"*.

8 There would need to be a careful and precise definition of adjudication.

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