KEATING LEGAL UPDATE

Winter 2023/2024

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WELCOME
to the Winter 2023/2024 Edition of KEATING LEGAL UPDATE

Since our last edition we have welcomed a new Senior Practice Manager, Paul Adams to the staff team. Paul joins with 20 years of clerking experience and supports our joint Directors of Clerking, Will Shrubsall and James Luxmoore in the overall management of the clerking team. We have also recently welcomed three new pupils to Chambers: Edmund Crawley, Kyle Walker and Youcef Boussabaine. With the next round of pupillage recruitment now underway, we have been delighted to meet many aspiring barristers at pupillage fairs and at our 7th annual Women at the Commercial Bar event. Those looking to apply to Keating Chambers in this recruitment round might be interested in the Q&As with junior tenants Mercy Milgo and John Steel (at pages 8 and 20 respectively). Other articles in this edition span the topics of the tort of deceit, PFI, and procurement.

2023 was a significant year for the construction law industry, with the Technology & Construction Court celebrating its 150-year anniversary. Keating marked this landmark occasion with the recording of five podcast episodes covering key themes emerging in TCC cases over the years. The last of these episodes will be released in January 2024 and all episodes can be accessed via our website. Last year we were also delighted to bring back the ever-popular silks roadshow, which returned to Bristol in November. We have plans to take the tour across the UK in 2024 with Manchester being the first destination. All the details will be shared on our website and social media pages in coming weeks.

In November we collected our final awards of the year, taking the full set of construction awards (for Chambers, Silk and Junior of the Year) at the Chambers Bar Awards. Congratulations to both Jonathan Selby KC and Tom Owen for their respective awards. This follows Head of Chambers, Alexander Nissen KC, being awarded Construction Silk of the Year by The Legal 500 earlier in the term. The year's Awards season kicks off in February with the inaugural Legal 500 MENA Awards, where we are shortlisted for the construction Set, Silk (Simon Hughes KC) and Junior (Jennie Wild) awards, as well as overall Set of the Year.

We would like to take this opportunity to wish all our clients a happy new year. 2024 has started positively for Keating with the fantastic news that Tom Owen has been successful in his application for Silk. Tom commands a formidable practice leading heavy and complex construction, energy, engineering, and professional negligence disputes. He is the youngest ever Silk to be appointed in modern times which is an exceptional achievement... We also wish Sam Townend KC the best of luck this year as he embarks upon his role as Chair of the Bar Council. Sam will be returning to his silk practice in January 2025.

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Tilting at Windmills: Siemens v HS2

By Sarah Hannaford KC & Simon Taylor

Judgment was handed down on 6 November 2023 by O'Farrell J in *Siemens Mobility Limited v High Speed Two (HS2) Limited & Bombardier Transportation UK Limited, Hitachi Rail Limited* [2023] EWHC 2768 (TCC). This case was heard at a 5 week trial in late 2022, with further dates in January and March 2023. Siemens brought 17 claims in total and the court heard from 18 witnesses. The claims were brought primarily on the basis of the Utilities Contract Regulations 2016 ("UCR") but public law principles were also invoked and the claims included 8 judicial reviews. All claims were dismissed.

Each claim contained multiple allegations that the court methodically considered and rejected. In relation to one of the later claims concerning an allegedly intended modification, the judge observed at paragraph 689 that Siemens was *"tilting at windmills"*. It might be said that this literary metaphor characterises much of Siemens' approach to the litigation.

As in 2021 in *Bechtel Limited v High Speed 2 (HS2) Limited* [2021] EWHC 458 (TCC), HS2's procurement processes were vindicated by the court following a lengthy and wide-ranging trial.

This is a brief overview of the notable aspects of the case.

The scoring challenge

There was a challenge to the assessment by HS2 of more than 20 questions in its technical evaluation (Stages 2 to 4). A recurrent theme of the challenge was that HS2 made manifest errors by failing to reflect an alleged lack of evidence that the successful tenderer ("**the JV**" – comprising Bombardier Transportation UK Limited and Hitachi Rail Limited)'s proposals demonstrated compliance with the various specifications. The court found that that line of attack frequently involved misconstruing the questions, which asked tenderers to demonstrate either assurance that such compliance was feasible or the validity of their modelling or otherwise describe their approach to contract mobilisation and delivery. As the court pointed out at paragraph 381, it was not intended that HS2 should approve the proposals at tender stage as the design and delivery plans were incomplete.

HS2's role was to assess the tender responses against the specific questions asked and the award criteria without discrimination or manifest error. The court's role, in turn, is supervisory and the significant margin of appreciation enjoyed by the assessors was recognised. O'Farrell J cited with approval Fraser J's comment from *Bechtel* that *"There is… no judicial remedy for subjective dissatisfaction at losing a procurement competition"* (paragraph 145) and noted at paragraph 383 that *"It is not sufficient for Siemens simply to rely on deficiencies in the JV bid that were noted, discussed and taken into account by the assessors in reaching their consensus scores."*

In the 250 paragraphs of the judgment on scoring allegations, the court found that Siemens had identified not a single manifest error.

Exercise of discretion over 'shortfall tender'

HS2 exercised a discretion in the Invitation to Tender ("**the ITT**") to allow a tenderer which failed to meet one of the technical evaluation thresholds (a shortfall tender) to progress in the competition to the assessment of price at 'Stage 5'. The ITT set out relevant factors in the exercise of the discretion (paragraph 401). The court noted that while the discretion was expressed to be absolute it must not be exercised on an unlimited, capricious or arbitrary basis and must be exercised rationally and in accordance with the policy on which it was based.

The JV was a shortfall tenderer due to failing one sub-plan in one delivery plan, but did well on all other parts of the tender, unlike the other shortfall tenderers, and the discretion was exercised allowing it to progress in the competition. Siemens made a number of allegations that HS2 failed to recognise or take into account issues relating to deliverability risk and wrongly dismissed others. The court found that the complaints were either wrong, unjustified or failed to appreciate the process being followed by HS2.

The court also rejected the criticism of the roles played by the various HS2 review panels which ensured scrutiny and oversight of key procurement decisions. The court found that the decision taken by HS2 was careful, rational, based on relevant evidence and not contrary to the UCR.

Change of control consent

There was an unusual challenge to the timing and operation of provisions in the ITT which required tenderers to seek HS2's consent for a change of control and obliged tenderers to choose which tender would remain in the competition if that change resulted in two tenderers being part of the same corporate group (section 15.7.2). These provisions had been the subject of clarification questions in the same procurement in 2018 when a merger between Alstom and Siemens was mooted. That merger did not go ahead but a merger between Alstom and Bombardier did reach completion in late January 2021. The outcome of the technical evaluation, which was also finalised and notified to tenderers in January 2021, was that Alstom was disqualified and the JV's tender progressed to Stage 5, but neither tenderer knew the outcome of the other's tender as HS2 wished, for reasons of competitive tension in the procurement to keep the identity of the Stage 5 tenderers confidential until contract award.

HS2 therefore then agreed with the parties to the merger that it would tell each the Stages 2-4 outcome of the other's tender, so that they could make an informed choice under section 15.7.2. For obvious reasons, both Alstom (by now owner of Bombardier) and the JV chose the JV's bid.

Siemens' case was that HS2 had permitted Alstom and the JV to delay making the section 15.7.2 notification until after completion to ensure that they would not back the wrong bid. It also challenged the process of communicating the outcomes to the tenderers, alleging among other things that HS2 failed to comply with the undertakings provided by the merging parties to the European Commission by not appointing an independent expert to select which bid would remain.

The court pointed out at paragraph 499 that section 15.7.2 was not in fact engaged at all because Alstom's tender was disqualified at the date of completion and thus prior to HS2's consent being given for the change of circumstances. There was also nothing left for the independent expert to determine as there was by then only one tender in play and, in any event, HS2 had no obligation to appoint an independent expert as this was not provided for in the tender rules, HS2 was not subject to the merger undertakings and it was up to the tenderers to decide which of the tenders they wished to withdraw. The allegation that HS2 delayed the process was rejected as the obligation to notify HS2 of the change of circumstances under the terms of the ITT did not arise until there was a definite proposal to make a change and notification was duly made by the JV on 29 January 2021, the date of closure of the merger. Notification of the joint proposal under section 15.7.2 was made 5 weeks later, which was within the anticipated timescale. Moreover, there was no evidence that any delay gave Alstom or the JV an unfair advantage as Alstom knew by 24 September 2020 (the date of European Commission approval when Siemens said the section 15.7.2 obligation was triggered) that it was likely to be disqualified. The court also pointed to the responses to Siemens' own clarification questions from 2018 to show that HS2 did what it said it would do in the tender rules.

There was one failing on HS2's part, which was that it communicated with the merging tenderers by telephone rather than via the portal. This was the only breach that the court found in the 183-page judgment and was a technical breach of the tender rules with no causative effect.

Stage 5 and abnormally low

Siemens also made multiple allegations regarding the Stage 5 process, which was the comparison of the 'Assessed Prices' of Siemens and the JV to determine which was the most economically advantageous tenderer. The Assessed Price aggregated the contract price tendered for capital, maintenance and other costs and certain monetised benefits (or deductions) representing notional value to HS2 as a result of design features (such as number of seats and noise levels). The commercial assessors carried out checks on the consistency of the various documents and models used to compile the Assessed prices. This led to certain clarifications on the JV's tender which were challenged by Siemens.

Applying the principles set out in *Hersi v Lord Chancellor* [2017] EWHC 2667 (TCC), Regulation 76(4) of the UCR and the tender rules, the court held that the various clarifications sought arose due to inconsistencies or obvious errors that made no difference to the evaluation outcome and that it was permissible to correct these.

Somewhat bizarrely, Siemens challenged HS2's use of the alias 'Dr No' for Siemens to which HS2's response was that the JV's alias 'Le Chiffre' was an equally if not more evil Bond villain. The court agreed that there was no merit in this or other Stage 5 allegations.

On the abnormally low allegation, the court adopted at paragraph 559 the formulation of the law set out by Fraser J *in Bechtel* and held that it was a matter for HS2 whether to carry out an abnormally low review and how to do it. The court found that the significant difference in the Assessed Prices of the two tenderers was expressly considered by HS2, including Siemens' greater allowance for risk, contingencies and margin. HS2 did not find the JV's bid to be abnormally low and, in the absence of that finding, there was no obligation on HS2 to require the JV to explain its prices. Siemens failed to establish that there was irrationality or manifest error in the finding that the JV's bid was not abnormally low.

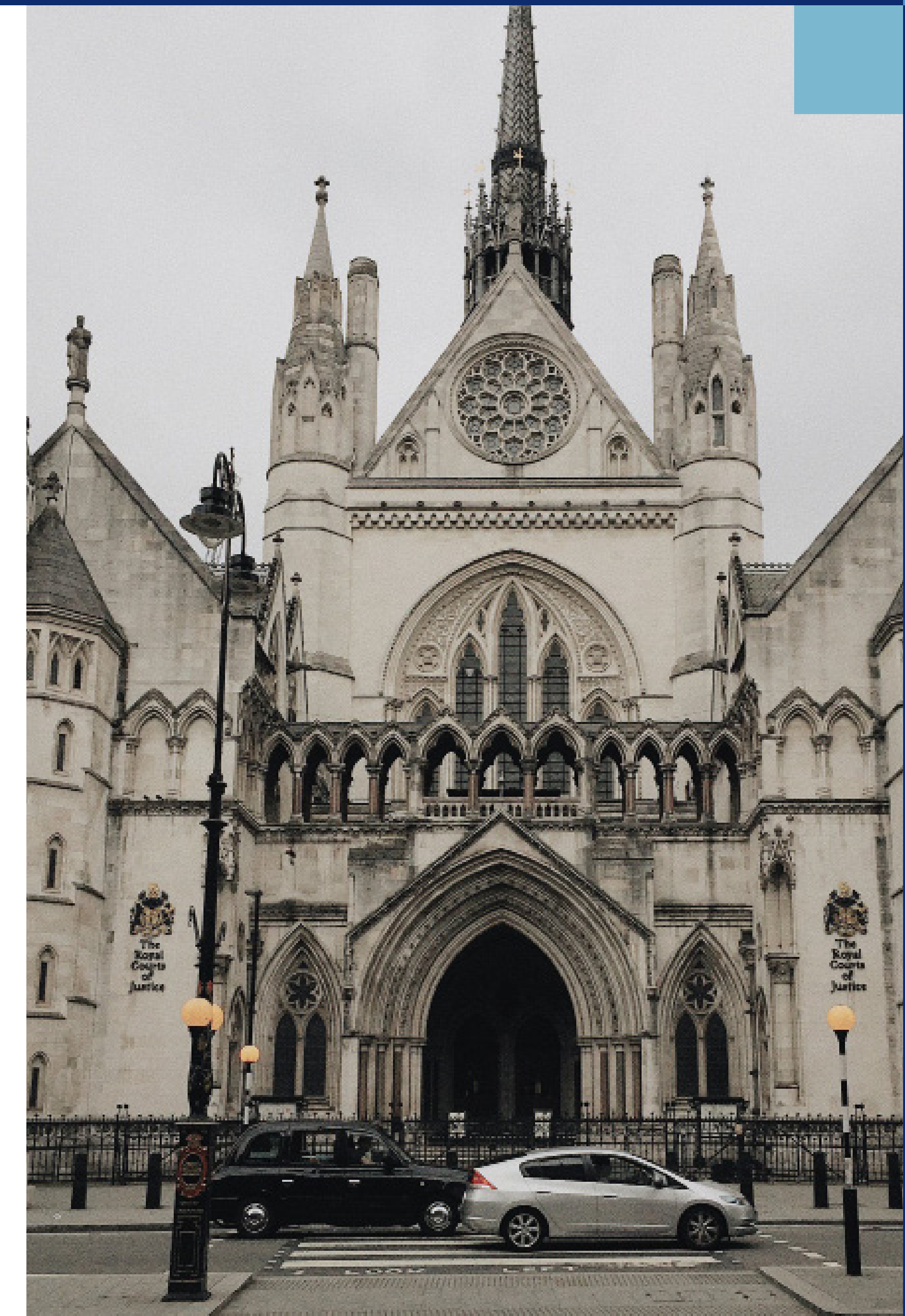
Verification and pre contract checks

Siemens argued that Case C-448/01 *EVN AG and Wienstrohm GmbH v Austria* [2003] ECRI-14527 gives rise to a general duty to verify tenders after evaluation but before negotiation or award under the equal treatment principle. The court rejected this interpretation of *EVN*, finding that unlike in *EVN*, HS2's tender documents, including at pre-qualification (PQP) stage, contained assessment criteria and requirements which permitted the responses to be effectively verified as part of assessment. While the tender documents enabled HS2 to review or verify information submitted by tenderers up to contract award there was no obligation to do so.

Nevertheless, HS2 did conduct certain pre contract checks on the JV's financial standing and technical issues relating to the JV partners which had arisen subsequent to the assessment of capability at PQP stage. The court accepted the submission that having decided to do so, HS2's checks must be carried out and its discretion (as to whether or not to exclude tenderers) exercised rationally and without manifest error (paragraph 619). Siemens made multiple allegations regarding the pre contract checks carried out, all of which were rejected by the court.

On the financial checks, the court decided that Siemens' criticisms were misplaced and their disagreement with HS2's conclusions on the JV's financial resilience was not sufficient to establish manifest error.

On the technical side, the court found that Siemens' *"challenge amounts to no more than an assertion that [the individual reviewing the checks] should have found that the issues raised were so serious as to oblige HS2 to disqualify the JV. That fails to grapple with the exercise he was undertaking …"* (paragraph 641).



HS2 was not reassessing the tender responses and any such fresh assessment would breach principles of equal treatment and transparency as it was not provided for in the tender rules. It was undertaking a review to assess whether new issues, such as delay and cracking on other trains gave rise to grounds for reconsidering the earlier evaluations. They did not because they related to different designs, materials and suppliers. HS2 considered these matters and the court found no errors in HS2's analysis and report.

Modifications

Siemens argued that the award decision was made by HS2 on the basis that it would later change the train design substantially, in particular to add more doors, without factoring in the impact of such a change on the assessment process. It claimed that this was inevitable on the basis that the JV's design did not meet the Department for Transport ("the **DfT**")'s dwell time (ie the time spent between doors opening and closing) and journey time requirements and should have been disqualified for a failure to meet certain mandatory requirements (TTS-94 and TTS-161).

The court found there to be no evidence that the JV failed to meet these mandatory requirements. Concerns were raised by the West Coast Partner (the franchisee) over whether the static dwell time model ("**SDTM**") used by HS2 to assess the dwell time performance of the proposed design was an accurate reflection of the likely mix of travellers, but this was the model used in the tender rules and the court accepted the evidence that there were no irregularities in the SDTM or the data used (paragraph 677).

The court noted the considerable latitude afforded to a utility using the negotiated procedure to make changes, as recognised in *Bechtel* and found there to be no unfairness in principle to Siemens in HS2 considering such changes and no decision made to make the changes. The court also rejected the argument relating to DfT requirements as these did not form part of the tender rules and HS2's evidence that the DfT requirements could be met in a variety of ways was accepted. The decision to enter into the contract with the JV was not outside the range of reasonable decisions open to HS2 (paragraph 680).

Finally, Siemens argued that the claim relating to the alleged substantial modifications, though brought after the contract had been entered into with the JV, triggered an automatic suspension. This prompted the court to find that *"Siemens is tilting at windmills"* (paragraph 689).

There was no contractual change or notional contract to which a suspension could attach. The court also rejected the request for an order preventing HS2 from entering into the alleged modification, not least because no design changes had been instructed and any future change would be different from those which had been rejected, so any declaratory order would be obsolete (paragraph 691).

Conflicts

In claims brought in the months before trial in 2022, Siemens alleged that two HS2 employees involved in the procurement had conflict of interest by virtue of the fact that they had defined benefit pensions from their previous long employment at Bombardier. It was not alleged that the prior employment itself was a conflict. That would have been time-barred as Siemens knew of their involvement and prior employment as early as October 2021. It was the pensions issue that only came to light in correspondence in August 2022.

HS2 argued that the pensions conflict was time barred, partly on the basis of Siemens' own evidence from their head of pensions at trial that it was "almost inevitable" that the individuals would have defined benefit pensions given the time of their prior employment in the early 2000s. The court rejected the limitation point on the basis that the individuals could equally have cashed in their pensions, Siemens did not know for a fact that they still had them until August 2022 and it was not incumbent on Siemens to have asked the questions about pensions in October 2021 that it later asked in July 2022.

However, the court rejected the pensions conflict claims (paragraph 755) because it considered that the pensions did not give rise to a conflict, applying the test in Regulation 42 and the common law doctrine of apparent bias (*Porter v Magill* [2002] A.C. 357). The court noted that, in deciding whether the fair minded and informed observer would consider that the interest might be perceived to compromise the impartiality of the individuals, it should have regard to admissible evidence about what actually happened in the course of decision making and all relevant factual circumstances. The ultimate question was whether the proceedings were and were seen to be fair (*Virdi v Law Society* [2010] 1 WLR 2840). The material circumstances included that the pension was held in a separate Fund, administered by trustees to meet long-term pension liabilities, acting in the best interests of the Fund's beneficiaries, rather than Bombardier's. The sequence of events necessary before there would be any impact on the value of the pensions (including Bombardier's insolvency, no rescue of the Fund by another employer, a deficit in assets in the Fund which could not be recovered) and the fact that the Pension Protection Fund would then provide compensation of 90% (and a cap on increases for inflation) was such that the interest of the two employees was so remote as to be immaterial.

The court added that the various steps taken by HS2 to manage potential conflicts and avoid distortions of competition, including training, having 3 assessors for each question, anonymisation of tenders and three levels of review of decision making by HS2 panels, ensured that there was no unfairness or appearance of unfairness. Finally, and in any event, the individuals involved were not decision makers and Siemens had failed to establish that any of the impugned decisions would have been any different had they not participated.

A further, very late claim was issued on 29 December 2022 and served on 5 January 2023, after the close of evidence, arising out of evidence given in cross examination on 30 November 2022. This claim was the subject of an application to strike out and reverse summary judgment by HS2, which was heard on 14 March 2023 (closing submission in the main trial having been made on 23 January 2023). The alleged conflict of interest was that one of the individuals with the pension interest had also maintained contact with former colleagues at Bombardier and HS2 had failed to prevent this.

The court considered the case law on abuse of process (*Henderson v Henderson* (1843) Hare 100) and the guidance in cases on very late amendments (*CIP Properties v Galliford Try* [2015] EWHC 1345 (TCC) and *Quah Su-Ling v Goldman Sachs* [2015] EWHC 759). The court criticised Siemens for failing to provide an adequate explanation for the delay in issuing the claim between 30 November 2022 and 29 December 2022 (paragraphs 802-803). The court cited Lewison LJ in FAGE UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; *"The trial is not a dress rehearsal. It is the first and last night of the show."* The court went on to find, against this background, that the late claim had no real prospect of success. The court found that the fair minded and informed observer would not perceive that his impartiality and independence was compromised and concluded that *"it would be oppressive and unjust to HS2 for it to be vexed with another trial … on the chance that, on a further trail of inquiry something might turn up"* (paragraphs 811 - 813).

Judicial Review Claims

Finally, permission was refused for the 8 parallel judicial review claims brought which relied on the same allegations as the Part 7 claims, with reference to public law duties, on the basis that (a) Siemens was not entitled to invoke public law duties in support of its UCR claims (see paragraph 129), (b) the challenges raised concern a commercial competition and did not contain any public law element and (c) there was a suitable alternative remedy in the UCR as demonstrated by the (multiple) Part 7 claims.

Commentary

The case is notable for at least the following important points.

First, the judgment reinforces that a claimant cannot win if it is unable to show that there were manifest errors in the assessment conducted or decisions taken or other material breaches of duty. Those might be a failure to follow the published tender rules, deficiencies in a tender response not considered by assessors or an irrational exercise of discretion. But there is no remedy for subjective disagreement by unsuccessful bidders.

Second, the court firmly rejected the proposition that parallel judicial reviews could or should be issued, relying on the same allegations and claiming identical relief. It is now clear that claimants should not invoke public law principles such as legitimate expectation in procurement disputes, given the scope of the principles of equal treatment and transparency (paragraph 131).

Third, the formulation of the law on abnormally low tenders as set out by Fraser J in *SRCL v NHS Commissioning* [2018] EWHC 1985 (TCC) and *Bechtel* has again been endorsed. If an authority does not consider a bid to be abnormally low, it does not need to require a tenderer to explain its prices and to succeed a claimant would need to show at least manifest error or irrationality in the authority's consideration of the issue.

Fourth, the court made clear its position on the meaning of *EVN* and that there is no general duty of verification of tenders or qualification status prior to contract award.

Fifth, the judgment makes clear that, if matters arise in the course of cross examination that the claimant wishes to deploy in fresh allegations, it should act before the curtain closes on evidence.

In addition, it is submitted that the case raises important questions about multiplicity of claims and allegations.

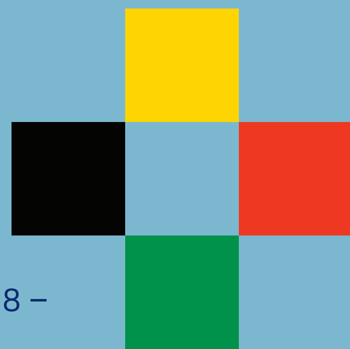
First, the court was obviously concerned about the large number of claims, stating at paragraph 797 that *"In most cases, the issue of 17 different claims by a claimant against the same defendant, in respect of the same dispute, arising out of the same procurement, would be considered to be an abuse of process"*. Whilst the court acknowledged that the bringing of new claims to avoid limitation issues was a well-established practice in procurement cases, it is submitted that this established practice is only justified if the claims raise new causes of action and, even then, the claimant should seek the defendant's approval for amendments before issuing a new claim.

Second, whilst wide-ranging allegations are often pleaded at an early stage (sometimes due to limitation concerns), it is submitted that it is sensible to weed out weaker allegations well before trial to avoid unnecessarily long and costly litigation.

Finally, this case provides a good example of a utility with a sophisticated set of tender rules and processes, including the use of tiers of review panels to ensure proper oversight of decisions and good governance. HS2's procurement processes for high value procurements have again been examined thoroughly and given a clean bill of health.

MERCY MILGO Q&A

Mercy Milgo was called to the Bar in 2019 and became a tenant at Keating Chambers in 2023 following the successful completion of her pupillage. During pupillage, Mercy gained experience of Chambers' main practice areas including construction and engineering, professional negligence, procurement and competition, international arbitration, insurance, adjudication, energy and natural resources. Mercy has worked on cases involving a variety of standard form contracts, including the JCT, NEC, FIDIC, as well as bespoke construction contracts and PFI agreements.



You've recently gained tenancy at Keating, what did you enjoy the most about being a pupil?

What I enjoyed most about being a pupil was learning something new every day. For instance, my first pleading concerned a defective underfloor heating manifold system and in particular, defective thermostatic mixing valves. Getting to grips with how the system operated was both challenging and rewarding. I think what makes construction law particularly fun compared to other practice areas is the unique ability to become an "expert" on technical issues that arise in cases.

I also enjoyed the advocacy assessments which were judged by silks in Chambers. It was great to receive feedback from experienced members of chambers who were very generous with their time. The feedback from these assessments made my first hearing at the Central London County Court a success as I knew what would work and wouldn't work in terms of good advocacy.

During your pupillage, you gained experience in a wide range of disputes. Can you highlight a particularly interesting case you worked on during this time and the key takeaways from that experience?

My pupillage experience was incredibly varied; I worked on several domestic and international construction disputes. A particularly interesting case that I worked on during my first seat of pupillage was *Resource Recovery Solutions (Derbyshire) Ltd v Derbyshire County Council & Anor [2023] EWHC 708 (TCC)* in which Paul Bury (my then supervisor), represented the Claimant alongside a silk from a different set. *RRS* involved knotty issues of contractual interpretation concerning sums owed following the termination of a Project Agreement for the procurement of waste management facilities and services. I enjoyed working on *RRS* because the construction issue was not only intellectually stimulating, but it also resulted in several procedural applications including summary judgment and strike out applications. I also liked being part of a wider legal team and observing the brilliant working relationship between the counsel team and the instructing solicitors.

What does a typical day look like?

This would very much depend on my workload. At the moment, I'm being led by Simon Hughes KC in a fire safety case concerning matters of principle arising from *Martlet Homes Limited v Mulalley & Co. Limited [2022] EWHC 1813 (TCC)* and the recent Developer Remediation Contract. I have spent a few hours preparing for a conference on this matter. I'm also currently drafting a pleading on a different sole matter. Additionally, I'm currently writing an article on FIDIC Clause 20 for the autumn edition of the KC Legal Update, our quarterly update for clients. I will also soon spend a week behind the bench with judges of the TCC as part of the TECBAR Marshalling Scheme. My days therefore usually involve juggling both led and sole work, responding to client emails, writing papers on topical legal issues that I find interesting or spending time seeing advocacy in Court.

Before commencing pupillage at Keating, you spent a year as our Legal Assistant, what did you enjoy the most in that role?

The legal assistant role provided invaluable insight into Chambers' practice areas and culture. I enjoyed conducting legal research on live cases for barristers (including on *Martlet Homes Limited v Mulalley & Co. Limited [2022] EWHC 1813 (TCC)*, the first decision from the TCC on fire safety (external wall insulation) following Grenfell)), assisting arbitrators and preparing seminars/talks to develop Chambers' business.

I also particularly enjoyed assisting with members' publications, including Keating on NEC (2nd edition) which provides commentary on NEC4 clauses, alongside those of NEC3. It was fun working on this edition with David Thomas KC, Krista Lee KC and the wider team in Chambers and exciting to be listed as a contributing author in the book.

Additionally, the role provided a good opportunity to build long term relationships with both barristers and members of staff. Developing a good rapport early on with members of chambers and the clerks made my pupillage experience so much more enjoyable.

What advice would you give to aspiring barristers who are in the early stages of their legal career, particularly those looking for a career at the Commercial Bar?

- Firstly, aspiring barristers should carefully read the pupillage selection criteria for the commercial sets they are interested in;
- Secondly, they should go through the CVs of recent tenants at those sets; and
- Thirdly, they should aim to acquire the skills that evidence meeting those criteria.

I would also advise treating every piece of written work, including your pupillage application, as a piece of advocacy; aim to be concise, persuasive and grammatically correct.

Lastly, make the most of the resources available to you. There are now various organisations and schemes aimed at supporting aspiring barristers, particularly those from underrepresented groups. They include Bridging the Bar which runs an annual academy that helps 100 candidates gain access to multiple programmes, the COMBAR student mentoring scheme which Chambers has been part of since its inception, and the 10KBI programme with a steering committee involving Members of Chambers, among others. Some commercial sets also run their own mentoring schemes which involve unassessed mini-pupillages. Be proactive and apply for these opportunities.

Try to remember that the worst that can happen when you apply for any given opportunity is a rejection which builds resilience, an essential skill for the Bar!

THE TORT OF DECEIT: AN OVERLOOKED AVENUE OF RECOVERY IN CLADDING CLAIMS?

Following the Grenfell tragedy on 14 June 2017, it has become all too clear that many buildings contain defective cladding systems. Whilst some uncertainty remains as to exactly how this came to be the case, there is a growing consensus that the way many cladding products were marketed by the manufacturing companies was, at best, questionable and, at worst, dishonest.

Where a dwelling contains defective cladding, those with a legal or equitable interest in that dwelling can look to both the Building Safety Act 2022 ("the Act") and the Defective Premises Act 1972 ("DPA") to provide recourse.[1] But what about those who do not have a legal or equitable interest in a dwelling but are nevertheless facing loss as a result of defective cladding? A prime example might be a main contractor or designer facing liability under the DPA for a dwelling it built/designed many years ago. Understandably, in this scenario, the contractor/designer may well feel that it should not be the one left holding the loss; however, as a result of the new retrospective limitation periods introduced by the Act, the options for passing on or reducing its liability are likely to be limited.[2]

When faced with this scenario, parties generally look to the Act to provide the foundations for a contribution claim.[3] But, what if in all the excitement generated by the Act, a much older and potentially useful cause of action has been overlooked? The purpose of this article is to break down the tort of deceit and, in doing so, (hopefully) highlight why it should not be overlooked in the context of cladding claims.

By Adam Walton

1 Those who manufactured and/or sold the defective cladding can be pursued under section 149 of the Act, and those who took on work for the provision of the dwelling can be pursued under section 1 of the DPA.

2 Claims under s.1 of the DPA and s.149 of the Act have a thirty-year retrospective limitation period where the cause of action accrued before 28 June 2022: see ss. 135 and 150 of the Act. So, for example, if a claim relates to a dwelling built in early 2008, absent a bespoke limitation period, the contractor/designer on the hook will be unable to pass on/reduce its liability by bringing claims in contract (see section 5 and/or section 8 of the Limitation Act 1980), or negligence (see section 14B(1) of the Limitation Act 1980)

3 For example, by establishing the cladding manufacturer's (or another such party's) liability under s.149 of Act and then seeking contribution for the "same damage" under the Civil Liability (Contribution) Act 1978.

The tort of deceit

The ingredients of the tort of deceit were set out by Jackson LJ in Eco 3 Capital Limited v Ludsin Overseas Limited [2013] EWCA Civ 413 at [77]:

"(i) The defendant makes a false representation to the claimant.

(ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.

(iii) The defendant intends that the claimant should act in reliance on it.

(iv) The claimant does act in reliance on the representation and in consequence suffers loss.

Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does."

Ingredient (i): The defendant makes a false representation to the claimant

Deceit responds to materially false representations of fact or law, which are made expressly or implied from conduct.

Where there is a dispute about the falsity of the alleged representation, the court normally looks to how a reasonable representee circumstanced as the actual representee would have understood the representation.[4] However, as Clarke J noted in Raiffesen Zentralbank Osterreich v Royal Bank of Scotland plc [2010] EWHC 1392 (Comm) at [339], *"it is not sufficient that the representation was false in a sense which the representor did not understand or intend it to bear"*. Accordingly, it is for the claimant to show that the defendant intended its representation to be understood in the sense in which it is alleged to be materially false.

Deceit would therefore be capable of responding to false representations made by a cladding manufacturer about its defective cladding product. Such representations may, inter alia, relate to: performance criteria, suitability for use on certain buildings, compliance with standards and regulations, and the results of testing.

Ingredient (ii): The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false

Ingredient (ii) requires fraud, and the essential requirements of fraud were set out by Lord Herschell in Derry v Peek (1889) 14 App Cas 337 at 374:

"First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

So, contrary to what many may instinctively think, fraud (in this context at least) does not require active and conscious dishonesty. Indeed, to satisfy ingredient (ii) the claimant need only establish that the cladding manufacturer: (1) had no belief in the truth of its representations about the defective cladding; or (2) was reckless or careless as to whether the representations it made about the defective cladding were true or false.

With regard to establishing fraud, as against certain cladding manufacturers, the Grenfell Inquiry should give heart to potential claimants: whilst the evidence put before the Inquiry about the conduct of cladding manufacturers has been generally startling, as against one manufacturer, the evidence was of such veracity that it was described as having perpetrated a fraud on the market.

Where fraud can be established, it will be no defence for the cladding manufacturer to claim that it did not intend to deceive or mislead the claimant.

Ingredient (iii): The defendant intends that the claimant should act in reliance on its representation

Intent, for the purposes of ingredient (iii), is formulated in the same way as in the criminal law: to act with intent means for the cladding manufacturer to have made the false representation with a view that it shall be acted upon by the claimant. In this way, intent includes both the case where the cladding manufacturer actually desires the claimant to rely on what it says, but also where it appreciates that in the absence of some unforeseen intervention the claimant will actually do so.[5]

As set out by Flaux J (as he then was) in OMV Petrom SA v Glencore International AG [2015] EWHC 666 (Comm) at [139], for the purposes of deceit, there are three types of representee:

"first, persons to whom the representation is directly made and their principals; secondly, persons to whom the representor intended or expected the representation to be passed on and thirdly, members of a class at which the representation was directed."

It is thus not necessary for the cladding manufacturer to know precisely who the representation is intended for, provided it intends it to be relied on by someone in the claimant's position.[6] This can pertinently be seen from the decision in Swift v Winterbotham (1873) LR 8 QB 244 at 253 where it was held:

"In order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby."

The courts can be observed to have taken a liberal approach toward what constitutes a representation to "a class of persons", and have held that an action for deceit could be based on a newspaper advertisement, provided the claimant could show that s/he was one of the class of persons at whom it was directed: Richardson v Silvester (1873) LR 9 QB 34. In this regard, as the editors of Clerk and Lindsell on Torts (24th ed.) observe at para. 17-34:

"It is obviously a question of fact whether in a particular case a person was intended to rely on a false statement. In practice, however, the test is often whether it was in the defendant's interest that he should do so."

Sensibly, then, anything used to market defective cladding products (product brochures, leaflets, and British Board of Agrément certificates, for example) could be capable of founding a claim in deceit.

Ingredient (iv): The claimant does act in reliance on the representation and in consequence suffers loss

In the context of deceit, reliance operates as a narrow form of factual causation: the claimant's loss must have resulted from its reliance upon the cladding manufacturer's false statement. The false representation

4 Barley v Muir [2018] EWHC 619 (QB) at [177].

5 Zagora Management Ltd v Zurich Insurance Plc [2019] EWHC 140 (TCC) at [11.16].

6 So, for example, someone in the position of a main contractor, architect or designer.

7 Hayward v Zurich Insurance Co Plc [2016] UKSC 48 at [18], [26]-[27]; J. Murphy, "Misleading appearances in the tort of deceit" [2016] *Cambridge Law Journal 301, 308.*

judgment or mind of the claimant, but it need not have been the sole cause of its loss: all that is required is that the claimant was partly influenced to act in the way it did by the false representation.[8]

In the context of agency, an agent's reliance can constitute a claimant-principal's reliance. Indeed, as Flaux J (as he then was) held in OMV [2015] EWHC 666 (Comm) at [139]:

"it is clear that where the agent acting on behalf of the principal has relied on the fraudulent misrepresentation and the principal thereby suffers loss, the principal can recover in deceit even if the relevant representation is not actually passed to him."

Whilst it is a defence to a claim in deceit to establish that the claimant actually knew the truth, it would be no defence for a cladding manufacturer to argue the claimant's reliance was unreasonable or that the claimant might have discovered the falsity of the representation through exercising ordinary care.[9]

Accordingly, it would not matter whether or not the claimant was sensible to choose the defective cladding product. All the claimant would need to establish is that it (or its agent) relied upon or was in some way influenced by the manufacturer's false representations when deciding to use the defective cladding, and it was this choice that led it to suffer loss.

Damages: what could be recovered?

In short, just about everything: the measure of damages in deceit is all loss directly flowing from the claimant's reliance upon the defendant's false representation.[10] In this way, it would be no defence for a cladding manufacturer to claim the loss suffered by the claimant was unforeseen.

It is to be noted, however, that a claimant is not entitled to damages in respect of loss which it could reasonably have avoided once it became aware of the deceit.[11] In other words, upon becoming aware of the cladding manufacturer's deceit, a claimant must still seek to mitigate its loss.

Limitation

Although deceit is subject to the same six-year limitation period that other torts are subject to,[12] as it is fraud-based, the fraud exception set out in section 32 of the Limitation Act 1980 applies. It provides relevantly:

"(1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; ...

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

Pursuant to section 32(1)(a), then, the six-year limitation period only begins to run from the point when the claimant discovered, or could have discovered with reasonable diligence, the actual fraud (i.e., the deceit) which is alleged to have been perpetrated by the cladding manufacturer.[13]

In relation to what amounts to reasonable diligence, the question is whether or not the claimant could have discovered the fraud without taking exceptional measures it would not reasonably have been expected to take. As Millet LJ (as he then was) held in Paragon Finance Plc v Thakerar & Co [1999] 1 All ER 400 at 418:

"The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ ... suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

So, where a deceit claim is brought against a cladding manufacturer and a limitation defence is raised, it would be open to the claimant to argue that its claim is not time-barred on account of the cladding manufacturer's deceit not being discovered, and not being reasonably discoverable, until much later.[14]

Pulling the threads together

In the scenario where (1) a party used (incorporated, purchased, etc.) a defective cladding product; (2) it did so on the basis of materially false representations made to it by the manufacturer, whether directly (in correspondence, for example), indirectly (i.e., through an agent or intermediary), or in marketing materials; and (3) that party has suffered loss as a result, deceit should not be overlooked as a potential route to recovering that loss.

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8 Hayward [2016] UKSC 48 at [26] and [29].

9 See Mellor v Partridge [2013] EWCA Civ 477 at [20] (Lewison LJ): *"it does not lie in the mouth of a liar to argue that the claimant was foolish to take him at his word."*

10 Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 at 167.

11 Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] AC 254 at 265-267 and 285.

12 See section 2 of the Limitation Act 1980.

13 See Barnstaple Boat Co Ltd v Jones [2007] EWCA Civ 727.

14 A possible argument might be that the deceit was not reasonably discoverable until Phase One of the Grenfell Inquiry was published in October 2019.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Van Elle Ltd v Keynvor Morlift Ltd [2023] EWHC 3137 (TCC) (8 December 2023)

This case relates to the installation of 4 new piles for a pontoon in the River Fowey in Cornwall which was used to moor the RNLI lifeboat. The works were subject to delays and Van Elle referred a dispute as to its entitlement under the final account to adjudication relying on a statutory right to adjudicate under the Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA").

The adjudicator made a decision substantially in Van Elle's favour, ordering the defendant ("KML") to pay the sum of £335,142.33 and rejecting its jurisdictional challenge that the contract was not a contract for the carrying out of construction operations in England so the statutory right to adjudicate under the HGCRA did not apply. KML continued to maintain its jurisdictional objection so Van Elle issued enforcement proceedings.

The jurisdictional issue raised a complicated, and apparently novel, question as to the geographical extent of "England" for the purposes of the Housing Grants, Construction and Regeneration Act 1996. The Court's reasoning and findings in relation to this is likely to be of interest to all those involved in adjudication, but particularly those dealing with works over, under or adjacent to water (whether that be in rivers or next to the coast).

The judgment also confirms that natural justice challenges on the basis that an adjudicator failed to decide a point in issue are (generally) only likely to succeed if the breach is deliberate and that "an unintentional oversight in the context of a fiercely contested final account dispute" is unlikely to be serious enough to be considered a material breach of natural justice invalidating the decision.

James Frampton represented the Claimaint.

Siemens Mobility Ltd v High Speed Two (HS2) Ltd [2023] EWHC 2768 (TCC) (6 November 2023)

Judgment was handed down in this long running procurement challenge by Siemens to HS2's award of a contract for the provision of rolling stock to a joint venture comprising Bombardier and Hitachi. In one of the most significant procurement judgments in recent years, O'Farrell J dismissed all 17 of the claims brought by Siemens. Siemens' claims were wide-ranging, including allegations of manifest error in the scores and HS2's exercises of discretion, of breach of public law principles, that the successful bid was abnormally low and that there were conflicts of interest. This judgment is essential reading for procurement practitioners.

Fionnuala McCredie KC and John Steel represented the Claimant.

Sarah Hannaford KC, Simon Taylor, Ben Graff and Tom Walker represented the Defendant.

Teleperformance Contact Limited v The Secretary of State for the Home Department [2023] EWHC 2481 (TCC) (6 October 2023)

The Court allowed an application by the defendant Secretary of State (D) to lift the automatic suspension pursuant to regulation 95(1) of the Public Contracts Regulations 2015 (the PCR).

The Claimant (C) had been successful in a tender process for the award of visa and citizenship applications for one lot. It challenged D's decision in relation to the award of the other lots. The Court considered whether in deciding if damages could be an adequate remedy for C it was open to the Court to consider the financial interests of companies that were in the same Group as C. The Court decided that damages would be an adequate remedy for C but not for D, and the balance of convenience lay in lifting the suspension.

Sarah Hannaford KC and Ben Graff represented the Claimants.

Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL) [2023] EWHC 2243 (TCC); [2023] EWHC 3051 (TCC)

In two judgments by HHJ Stephen Davies, valuable guidance has been given to the industry on final dates for payment and the scope of the S&T (UK) Ltd v Grove prohibition on commencing true value adjudications.

In the first decision, the Judge gave summary judgment in favour of Closed Circuit Cooling Ltd ("3CL") to enforce an adjudicator's decision, rejecting Part 8 declarations sought by Lidl. In doing so, he provided guidance on dealing with competing Part 7 & Part 8 applications and determined that the final date for payment of a sum due under a construction contract could not be fixed to an event or step (here, the submission of a VAT invoice) and, so as to comply with s. 110(1)(b) of the HGCRA, must be a period of time following the due date.

In the second decision, concerning two further adjudications between the parties, the Judge decided that S&T (UK) Ltd v Grove prohibited a party who had not paid a notified sum pursuant to s. 111 of the HGCRA from commencing a 'true value' adjudication in respect of any claim which could have been the subject of a pay less notice in the relevant notified sum payment cycle. The Judge found that parts of the claims brought by Lidl in Adjudication 2 (defects) and Adjudication 3 (delay) were commenced without jurisdiction because they were brought before Lidl had paid a notified sum and they amounted to true value claims that could have been the subject of a pay less notice in respect of that notified sum. The Judge therefore refused to grant summary judgment on these aspects of Lidl's enforcement claims.

Charlie Thompson represented 3CL in each judgment.

International Game Technology v The Gambling Commission

[2023] EWHC 1961 (30 August 2023)

This case concerned a procurement challenge arising from the competition for the Fourth Licence to run the National Lottery. The case dealt with the standing of the International Game Technology group ("IGT") to bring a challenge.

Four companies applied for the Fourth Licence: Camelot UK Lotteries Ltd, The New Lottery Company, Allwyn, and Sisal. Allwyn was the winning applicant, and Camelot was the second-placed bidder. IGT was a group that included companies involved with Camelot as sub-contractors or planned sub-contractors but did not itself apply for the Fourth Licence. After Allwyn's parent company purchased Camelot, Camelot discontinued its claim against the Commission.

The issue to be decided was whether the IGT Claimants had standing to bring a claim under the Concession Contract Regulations 2016 (CCR16) and whether they were economic operators to whom a duty was owed. The Commission and Allwyn argued that the IGT Claimants lacked standing as they were, at best, sub-contractors to Camelot and not bidders for the Licence. The IGT Claimants argued that a duty was owed to each of them because they were "economic operators"; that the position in EU law is immaterial; and that what mattered was the simple interpretation of the definition of "economic operator" now used in the CCR16.

An additional issue arose concerning the third claimant, a U.S. company, and whether the procurement was covered by the Government Procurement Agreement (GPA) with the USA.

In a separate consequentials hearing the Gambling Commission claimed an order against IGT for their costs of the claims (including the preliminary issue on standing) and for a payment on account of costs. The interested parties ('Allwyn') also sought an order against IGT for the costs of the claims, including the preliminary issue. Coulson LJ agreed and gave judgment accordingly ([2023] EWHC 2226 (TCC)).

Sarah Hannaford KC represented the Defendant.

Halsion Limited v St Thomas Street Development Limited

[2023] EWHC 2045 (TCC) (8 August 2023)

The Judge allowed the defendant's strike out application against the claimant's Particulars of Claim. The claim was for recovery of an amount paid to the defendant pursuant to adjudication of a dispute arising from a trade contract. The defendant submitted that the Particulars of Claim (which were copied and pasted from a Response document in an adjudication) were incoherent, prolix, included submissions and irrelevant material and failed to comply with CPR 16.4(1)(a) and the TCC Guide. Further the defendant applied to strike out and for "reverse" summary judgment on the following issues: (1) the claimant's reliance on pre-contract negotiations in support of its construction of the contract on the basis that this was bad in law; (2) the declarations sought that the adjudication decision in the defendant's favour was "of no effect" (the previous wording had been to "set aside" the decision and this was also objected to) and (3) the declarations sought as to the proper construction of the contract, both on the basis that the declarations sought were futile and unnecessary, and thus would never be grated. The Judge accepted all the defendant's submissions; the Particulars of Claim were therefore struck out in their entirety pursuant to CPR 3.4(a), (b) and (c) and "reverse" summary judgment was granted. The claimant was given the opportunity to amend by way of a "wholesale redrafting" save for those aspects of the claim which had been held to have no prospects of success.

Lucy Garrett KC and Ben Sareen represented the Claimant.

USAF Nominee No. 18 Ltd & Ors v Watkin Jones & Son Ltd [2023] EWHC 1880 (TCC) (26 July 2023)

This case involves a dispute between three Claimants (USAF Nominee No. 18 Limited, USAF Nominee No. 18A Limited, and Apex Group Trustee Services Limited) and the Defendant, Watkin Jones & Son Ltd (WJ), a building contractor, regarding alleged defects in the design and construction of a building in Birmingham called Jennens Court. The contract for the project was based on a JCT 1998 Edition with Contractor's Design, and practical completion occurred in 2009. In 2020, concerns were raised about the cladding, leading to replacement works costing £3.797 million.

The Claimants' claims included damages for breach of a collateral warranty, negligence, and a claim under the Defective Premises Act 1972. The case primarily revolved around two key disputes:

(1) The Trust Element: Whether a merger in 2009 under Jersey law affected the appointment of trustees and their ability to bring the proceedings.
(2) The Security Element: Whether the Claimants had disposed of their interests in the Lease and the collateral warranty to Wells Fargo Bank, pursuant to a security agreement.

The court ruled that there was no impediment to the Claimants' title to sue. They were allowed to proceed to trial on the substantive issues. The court also determined that Jersey law applied to some of the issues regarding the merger, and there was no absolute assignment of rights to Wells Fargo under the security agreement.

Jonathan Selby KC and Alexandra Bodnar represented the Claimant.

By Sean Wilken KC

Pitfalls in Terminating PFI Contracts

Anecdotally it appears that terminating PFI contracts, once anathema, is becoming more common. Further, an ageing PFI estate means the parties to PFI arrangements are becoming increasingly at loggerheads over historic defects, life cycle and hand back issues. This may enable on or both of the parties to allege that there has been a repudiatory breach of the various agreements. Assuming that there is a set of contractual termination provisions and there is not an exclusive termination clause (one which excludes any common law right to terminate by accepting repudiatory breach), the parties may have a choice whether to terminate under the contractual terms or by accepting a repudiatory breach. This choice raises commercial and legal issues for the parties.

Commercially, there is the obvious question whether a contractual termination or a claim for damages would leave a party better off. Whilst this is an obvious question, the answer to it may not be – particularly where there are equity and debt adjustments to be made on termination. There is also the issue that contractual termination very often carries with it post-termination cooperation provisions. These may be onerous and obviously would not apply if the contract was terminated for repudiatory breach. Thus, there may be reasons to avoid a contractual termination route and to proceed down the repudiatory breach route – even though so doing would require the party claiming to establish causation and loss[1].

Legally, there is the question of whether one can terminate both contractually and by accepting a repudiatory breach[2]. This question is far from straightforward. The learned authors of Wilken & Ghaly *The Law of Waiver, Variation and Estoppel* 3rd Ed OUP considered the point as it stood in 2012 at 6.14 where they said:

6.14 Three points emerge from these cases. First, it is not uncommon for the parties to provide for a contractual termination to carry with it specific rights and remedies which would not flow under the common law. Thus, a contractual termination may require the return of property and plant or the payment of additional monies but an accepted repudiation will simply discharge the parties from all future performance. Dependent on the facts, therefore, it may well be in one party's then commercial interest to pursue one course and not another. Second, what the result of pursuing one course rather than the other will depend on facts and the individual contract terms at issue and how those relate to the stance later adopted by the parties.[3] This flows from the facts that (a) contracts obviously differ and (b) there is no particular, requisite form for the acceptance of a repudiation.[4] Third, absent unusual contractual wording, there is, however, nothing to prevent a party serving both a common law notice and a contractual notice—in the alternative—in an attempt to preserve its rights.[5] If that course is adopted it should be remembered, however, that any preservation of rights might only be short-lived. At some point it is highly likely that the parties will have to act as if one or other was valid—that is, proceed with the contractual termination or the repudiation. At that point, as and when the parties proceeded down one path or the other,[6] the benefit of any reservation of rights would be lost.

This commentary relied on: *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 and since then there have been two further relevant authorities: TLC v Leofelis SA [2012] EWCA Civ 985; and *Phones 4U* Ltd v EE Ltd [2018] EWHC 49.

In *Shell Egypt* the issue was whether Shell lost the ability to claim loss of bargain damages because Shell had exercised a contractual right to terminate (see analysis at [104 – 5] in Phones 4U). The arbitrators held that Shell had lost that right. On appeal, Tomlinson J (as he then was) said as follows:

31. Certain principles emerge clearly from the authorities.

i) "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that [the] aggrieved party is treating the contract as at an end." See Vitol SA v Norelf Ltd [1996] AC 800 at 810-11 per Lord Steyn. That was however a case of acceptance by silence, or more accurately by the failure of the sellers to take any further step to perform the contract which was apparent to the buyers and from which they knew that the sellers were treating the contract as at an end. Before Shell can avail themselves of this principle they must first overcome the hurdle of showing that their Termination Letter did not communicate a clear intention to terminate contractually under Clause 3.1.8 rather than to terminate for repudiatory breach.

ii) The invalid invocation of a right to terminate contractually on account of a breach of contract is capable of being effective to accept a repudiatory breach as terminating the contract if it unequivocally demonstrates an intention to treat the contractual obligations as at an end. See Stocznia Gdanska SA v Latvian Shipping Co. [2002] 2 Lloyd's LR 436. That however was a case where the contractual provision invoked was not a self-contained code, resort to which would necessarily exclude resort to the remedies generally available at law, but was rather "built on the underpinnings of the common law remedies for breach of contract" – see per Rix LJ at page 449, paragraph 72. Clause 3.1.8 may not be a complete code but resort thereto is inconsistent with treating the contract as terminated by acceptance of a repudiatory breach, not least because the clause is not triggered by breach and provides that in the event of resort to it Centurion shall not be obliged to repay to Shell any amounts paid under Clause 3.1.1. Mr McCaughran for Shell realistically accepted that if the Termination Letter is to be taken as an unequivocal communication by Shell of its decision to terminate the contract under Clause 3.1.8, it cannot also serve as effective to accept Centurion's repudiatory breach as terminating the contract.

iii) The principle which Mr McCaughran thereby recognised was authoritatively stated by Christopher Clarke J in Dalkia Utilities Services plc v Celtech International Ltd [2006] 1 Lloyd's LR 599. The context in that case was that the same conduct was capable of giving rise to a contractual right to terminate and a common law entitlement to accept a repudiatory breach. Since prima facie the innocent party can rely on both rights recourse to the former does not constitute an affirmation of the contract since in both cases he is electing to terminate the contract. However, if a notice "makes explicit reference to a particular contractual clause, and nothing else, this may, in context, show that the giver of the notice was not intending to accept the repudiation and was only relying on the contractual clause; for instance if the claim made under the notice of termination is inconsistent with, and not simply less than, that which arises on acceptance of a repudiation … In the present case markedly different consequences would arise according to whether or not there was a termination under Clause 14.4 or an acceptance of a repudiation." See per Christopher Clarke J at pages 632-633.

iv) The threads were drawn together by Moore-Bick LJ in Stocznia Gdynia SA v Gearbulk Holdings Ltd [2010] QB 27, 46 at paragraph 44 of his judgment:

"It must be borne in mind that all that is required for acceptance of a repudiation at common law is for the injured party to communicate clearly and unequivocally his intention to treat the contract as discharged: see Vitol SA v Norelf Ltd… per Lord Steyn. If the contract and the general law provide the injured party with alternative rights which have different consequences, as was held to be the case in Dalkia Utilities v Celtech, he will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant, but where the contract provides a right to terminate which corresponds to a right under the general law (because the breach goes to the root of the contract or the parties have agreed that it should be treated as doing so) no election is necessary. In such cases it is sufficient for the injured party simply to make it clear that he is treating the contract as discharged… If he gives a bad reason for doing so, his action is nonetheless effective if the circumstances support it. That, as I understand it, is what Rix LJ was saying in paragraph 32 of his judgment in Stocznia Gdanska SA v Latvian Shipping Co, with which I respectfully agree."

32. The present is a case where the contract and the general law provided Shell with alternative rights which have different consequences…

Tomlinson J then went on to hold that the arbitrators were correct to find that Shell had adopted the contractual termination route and, as a result, had lost the right to claim loss of bargain damages. This was in part because of a concession made by Counsel for Shell

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1 See *Peregrine Aviation Bravo Ltd v Laudamotion GmbH* [2023] EWHC 48 at 181

2 I park for present purposes that if one is contractually terminating, one must exactly comply with the contractual procedures – see *Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB) at [103]

3 For examples of the care with which the Courts will scrutinise the communications between the parties to ascertain whether there has been an election and if so, what the results of that would be, see *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834; [2004] QB 601 at [102] ff per Rix LJ; *Leofelis SA v Lonsdale Sports Ltd* [2008] EWCA Civ 640; [2008] ETMR 63 at [66 ff] per Lloyd LJ; *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 at [33 ff].

4 See *Vitol SA v Norelf Ltd* [1996] AC 800 at 810, 1 per Lord Steyn.

5 See *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 at [33 ff].

6 Indeed, the parties might have to proceed down one path or the other as refusing to do so could in some cases amount to a further repudiation of the contract.

that if the contractual termination route had been used, then no claim for damages flowing from repudiatory breach could be made – a concession which Tomlinson J said was the right one to make.

This question of whether the concession was correct was revisited in Phones 4U. There Andrew Baker J commented as follows:

118. None of the authorities is a precise precedent for the situation in this case. The closest cases are Cavenagh and Shell Egypt. Cavenagh is not a precedent for exactly this case, because there was no loss of bargain claim there by the employer; however, the basis upon which the Court of Appeal decided the case would rule out any such claim. The dismissal of the arbitration appeal in Shell Egypt would have been a decision directly in point, albeit at first instance so not binding on me, but for the concession I referred to in para 105 above. I said I would come back to Tomlinson J's view that the concession was rightly made, and I do so now.

119. That view, expressed in terms at para 31(ii), was built upon the starting point expressed at para 31(i), namely that Shell had to show "that their Termination Letter did not communicate a clear intention to terminate contractually under Clause 3.1.8 rather than to terminate for repudiatory breach". Mr Wolfson QC criticised that, arguing that the correct starting point was the presumption against giving up valuable rights (see Gilbert-Ash) and that there had been numerous cases where failure to refer to the common law right of termination had not defeated a common law loss of bargain damages claim. To my mind, those criticisms are misplaced. Shell Egypt was an arbitration appeal where arbitrators had held that the termination letter did not communicate a decision to terminate for repudiatory breach but rather communicated solely a decision to terminate under clause 3.1.8. Tomlinson J's particular formulation of what Shell had to show was apt for a case in which they had to persuade the court that in so holding the arbitrators had erred in law. Further, as my review of the cases has found, none is a decision contrary to that of the arbitrators upheld by Tomlinson J.

120. The principle as formulated by Tomlinson J also, and this is its importance for the present case, takes it as a given that a decision to terminate for the repudiatory breach later relied upon must in fact have been communicated. Hence, the critical question (per Tomlinson J at para 32) was whether Shell's termination letter unequivocally communicated (only) an election to terminate under clause 3.1.8, because if so, it could not "also serve as effective to accept Centurion's repudiatory breach as terminating the contract" (that being the proposition Tomlinson J saw as rightly conceded, see para 31(ii)).

121. Mr Wolfson QC argued that Tomlinson J was wrong to say, at para 31(ii), that resort by Shell to clause 3.1.8 was "inconsistent" with terminating for repudiatory breach at common law because: (a) the clause was not triggered by breach; and (b) it provided for Centurion to have no liability to repay amounts previously paid to it under clause 3.1.1. Tomlinson J said that to distinguish the case on its facts from Stocznia v Latvian Shipping and to relate it to the analysis in Dalkia at para 144. To my mind, none of that affects the correctness in principle of the proposition that if a termination letter communicates clearly a decision to terminate only under an express contractual right to terminate that has arisen irrespective of any breach, then it cannot be said that the contract was terminated for breach and so a claim for damages for loss of bargain at common law cannot run. The matters identified by Tomlinson J as "inconsistencies" are not like the "markedly different consequences" of common law and contractual termination in Dalkia. Given the Court of Appeal's decision in Stocznia v Gearbulk, I can see room for the argument that if clause 3.1.8 had been triggered by (the facts constituting) the very breach later complained of, (b) above might not have been a sufficient inconsistency of consequence to drive an interpretation of Shell's termination letter that it did not exercise the common law termination right but only the contractual right. But that, again, does not affect the soundness of the test taken by Tomlinson J to be correct.

122. Shell Egypt was also criticised by Liu [2011] LMCLQ 4, relied on by Mr Wolfson QC. Leaving aside the point actually decided by Tomlinson J (as to the purport of Shell's termination letter, on its proper construction), Liu's criticism of the judge's approach as a matter of principle seems to me to have depended on the proposition that it is sufficient, for the loss of bargain claim at common law, that the claimant should have communicated unequivocally that it treated the contract as discharged, whatever it might say as to why. There were dicta that could be read as supporting that proposition (eg per Rix LJ in Stocznia v Latvian Shipping at para 32, per Moore-Bick LJ in Stocznia v Gearbulk at paras 44 to 45). However, it has now been authoritatively rejected by Leofelis v Lonsdale. It remains true, as Liu emphasised, that "acceptance" of a repudiation requires no particular formality or form of words (see Vitol v Norelf). But it must communicate a decision to terminate for the repudiation later said to found the claim, in exercise of the common law right to terminate arising upon that repudiation, if a normal loss of bargain claim at common law is to be viable (ie leaving aside the inventive alternative claim suggested on appeal in Leofelis v Lonsdale). Otherwise, the claimant cannot say the termination and therefore its loss of bargain resulted from the repudiation sued upon.

123. I also disagree with Liu's suggestion that it was "wholly unsatisfactory" for Shell to have been "deprived" of loss of bargain damages where: (a) Centurion had been guilty of repudiation; and (b) the contract had in fact been terminated. Shell was not "deprived" of anything. It was taken to have chosen to terminate under clause 3.1.8 alone, a decision carrying a different set of risks and rewards, as built into the contract by the parties, as against a decision to terminate at common law alleging repudiation. It is not unsatisfactory to hold Shell to that element of the bargain. The injustice imagined by Liu assumes a connection between: (a) the repudiation; and (b) the termination; but the arbitrators' decision, upheld by Tomlinson J, was that Shell had not made that necessary connection.

124. ....

125. This case also does not concern a termination of a contract expressed to be for a repudiatory breach or renunciation that existed and gave rise to a contractual right of termination where only the contractual right is cited as justifying the termination. For such a case, two different issues arise: first, whether on the proper construction of the relevant contract, the innocent party only had the contractual right, ie whether its common law right was excluded or replaced, not merely supplemented; if not, then, secondly, whether the express reliance on the contractual right of termination defeats a common law claim for loss of bargain damages founded upon the conduct cited by the innocent party when terminating.

126. In such a case, if the innocent party succeeds on the first issue, then it has expressly terminated upon the basis of the very repudiation upon which it subsequently founds its cause of action. It can therefore say that the termination resulted from that repudiation; nothing more is required prima facie to found the common law loss of bargain damages claim. Reliance on a contractual right of termination when terminating in such a case is not inherently inconsistent with the subsequent pursuit of that claim. For this type of case, in general I agree with the analysis in Dalkia at paras 143 to 144. That analysis does not bind me, and was in any event obiter. However, it was treated as correct by Burton J and the Court of Appeal (obiter) in Stocznia v Gearbulk, which was in turn relied on by the Court of Appeal in Cavenagh; and Tomlinson J agreed with it in Shell Egypt at para 31(iii) (even if, strictly, I think he was wrong to describe it as authoritative). I would therefore be most reluctant to differ from the analysis in Dalkia if I disagreed with it. As it is, I agree with it.

Thus, *Phones 4U* could be said to present a contradiction. At [126] Andrew Baker J says that reliance on a contractual right of termination is "*not inherently inconsistent*" with a claim for loss of bargain. [126] must, however, be read with [118 – 125]. Those passages confirm *Shell Egypt* and that if you terminate under the contractual termination provisions, the right to claim loss of bargain damages is lost. That is further consistent with two basic principles of contract law. First, when faced with a repudiatory breach, the innocent party has to elect whether to accept the breach. If the innocent party does accept the breach then the contract ends there and then. Second, if, however, the innocent party does not accept the repudiatory breach by insisting

on the performance of the contract, then the contract continues and the repudiatory breach becomes a "thing writ in water".

The final authority is *TLC v Leofelis SA* [2012] EWCA Civ 985. This is a complicated authority – not least because some of the arguments relevant to this article were raised solely before the Court of Appeal. The relevant passages are as follows:

32. Mr Baldwin also put his case on the basis that it was possible to ignore the stated ground for termination in the 28 September 2007 letter and to treat the acceptance of the repudiation as having been made on more general grounds, namely Lonsdale's breach of the exclusivity obligation under the 2002 licence, regardless of the particular conduct relied on, and ignoring the incorrect particularisation of the relevant conduct. If that were correct, then it would not be a Boston Deep Sea Fishing case at all. This new proposition is not consistent with how the case was put to Kitchin J nor with how it is pleaded at paragraphs 39 and 40 of the Defence and Counterclaim. It seems to me that this approach cannot overcome the fact that the termination was expressed to be on the basis of the continued subsistence of the German injunction. That is very clear from the terms of the letters dated 14 and 28 September 2007. I agree with the judge that the catch-all phrase "without prejudice to any other breaches" makes no difference. It did not prejudice Leofelis' right to rely on other breaches, but it did not mean that Leofelis did thereby rely on another breach, of which it was not aware.

33. The principle underlying the Boston Deep Sea Fishing case has never been put forward as being that the unknown but justified ground for accepting a repudiation is to be read into the letter or other communication by which the unjustified reason is asserted. I do not see that the principle can or should be understood as extending that far. It does not allow the innocent party to assert that it did accept repudiation on the correct (though unknown) ground; rather it allows that party to meet a claim that its conduct in terminating the contract, though apparently unjustified because done on the wrong ground, is to be taken as justified because it could have been done on the right ground, not because it was done on the right ground. It operates as a shield against a claim for damages on the basis of wrongful termination, not as a sword to claim damages (for the future) on the basis of justified termination. For that reason it seems to me that, if Leofelis is to overcome the problem of its reliance on the German injunction in the letters of 14 and 28 September 2007, which is a causation issue, it must do so by showing that the German injunction was so closely connected with the wrongful SIA arrangements that the termination of the contract by the letter of 28 September 2007 cannot be seen as independent of Lonsdale's breach of contract, but rather that it was part of the chain of causation connecting Lonsdale's repudiatory breach with Leofelis' termination of the contract. In effect Leofelis would need to prove that, if Lonsdale had not undertaken its course of action aimed at interfering with Leofelis exclusivity under the 2002 licence and favouring Mr Schotsman's companies, it would not have sought or obtained the German injunction, or at any rate that, once Evans-Lombe J had held it to have been unjustified, Lonsdale would have had it discharged.

To unpack the reasoning here:

(a) *Boston Deep Sea Fishing* is authority for the proposition that if Y terminates the contract wrongly on one ground, it can defeat X's claim for damages for wrongful termination on the basis that Y could have terminated on another ground;

(b) The Court of Appeal says, however, that one cannot, in essence, rewrite the grounds of termination to rely on that for which one could have terminated. This is of a piece with the decision of Andrew Baker J in *Phones 4U (supra)*; but

(c) The Court of Appeal also appears to be saying that if one can causally and directly link the grounds of termination to the repudiation then a claim can be made.

Thus, on the authorities, there are passages that would support the proposition that a claim for damages can be based on repudiation where Y has terminated using the contractual provisions provided that there is, as a question of fact, sufficient overlap as to the sources of the claim.[1] Yet, there are also passages to the contrary. What therefore are the parties to do where there are both contractual grounds to terminate and the possibility of accepting a repudiatory breach?

From first principles there appear to be two situations:

(a) The contractual right to terminate and the right to accept the repudiation are coterminous – that is, the contract does not provide for additional rights on termination inconsistent with the instantaneous termination that occurs on acceptance of a repudiation breach;

(b) The contractual right to terminate and the right to accept repudiation are not coterminous. In this case, the contract provides for additional rights on contractual termination which assume the continuation of obligations under the contract.

In the former case, there is the argument that one can substitute one for the other as there is, in substance, no election – the contract terminates immediately, without more, under either route.

In the latter case, however, there is a distinction between the two routes. The one offers the benefit of continuing obligations, the other terminates all obligations as between the parties immediately. There is therefore an election to be made. Does Y choose one or the other? Under the law governing an election,[2] once Y chooses termination under the contract, then Y has gone down that route. Y cannot then reverse direction and claim the benefit of the other route – not least because an unaccepted repudiation is a thing writ in water and Y has affirmed the contract.

Practically, therefore, parties dealing with a terminating PFI contract will have to go through the exercise of ascertaining whether there are both rights to terminate contractual and to accept a repudiatory breach. If there are, are those rights coterminous. If they are (which is unlikely given the complex termination regimes in PFI projects), it may be possible for the party seeking to terminate "to have their cake and eat it". The more prudent route, however, would be to ascertain in detail which route is the more appropriate and then to make a choice, once and for all, on that basis.

1 See, however, *Peregrine Aviation Bravo supra* at [164 ff] where the Learned Judge took the view (obiter) that the concepts of repudiation and contractual termination were – at least in that case – clearly distinct.
2 See Wilken & Ghaly *supra* Ch 6 *passim*

JOHN STEEL Q&A

John Steel has practised at Keating Chambers since September 2020, having successfully completed his pupillage in Chambers. He undertook his pupillage having been granted the Michael Hodge Scholarship from the Inner Temple to complete the BPTC. He was called to the Bar in 2018.

Since becoming a tenant in Chambers, John has acted as sole counsel, in both the High Court (TCC) and County Court, as well as undertaking led work. Reflecting the core areas of Chambers' work, John's focus is on construction and engineering disputes, energy and infrastructure projects and procurement proceedings.

What attracted you to Keating?

I attended pupillage events at which barristers from Keating discussed their practice. There was a discussion around some of the international work that Chambers' is involved in. This sparked my interest in Keating.

Which case are you most proud of and why?

One memorable case involved acting for a responding party to an adjudication in an energy dispute. We had an excellent team of instructing solicitors, who assembled experts to address different elements of the claim: questions of engineering, delay and quantum. I particularly enjoyed the detail of the underlying technology.

You read History at university, what attracted you to the Bar?

I had focused on modern French political history, particularly the colonial history in Algeria, as an undergraduate, spending a year in Aix-en-Provence. This led me to do a Masters in public international law and international relations. The course was led by a barrister specialising in international law. I found I was drawn to the elements of the course which focused on legal analysis.

What are some of the realities and rewards of being a barrister specialising in the work of the TCC?

The work is fast-paced and complex. Clients often need advice at short notice or require assistance to either bring or respond to a claim at short notice. This is true of both disputes in construction and procurement law.

A particular reward is working as part of a wider legal team. Big cases require a number of barristers to work together alongside a team of solicitors. This is the most enjoyable part of the job.

What are the most important lessons you've learnt at the Bar so far?

- See everything from the perspective of the Tribunal. On a practical level, this helps focus on relevant points.

- Simplify matters wherever possible. It is allied to the first point: a submission is much more attractive if readily understandable.

- Ask questions, even if they risk revealing misunderstandings. They can sometimes reveal points of weakness in a case, or at the very least help you serve the case better.

- Look after your well-being. Keeping up other interests, even when busy, is important. It also allows healthy perspective.

In your opinion, what is the secret to writing a successful pupillage application?

Approaching pupillage applications as a form of written advocacy is likely to improve them. It is best looked at as an opportunity to look to persuade the reader that you have real potential in their chambers.

Which career would you have chosen had the Bar not come calling?

A foreign correspondent. I remember Alastair Leithead (also from Tyneside) from the BBC coming to give a talk at school about his time reporting from Afghanistan. I found that compelling. Jeremy Bowen is something of a hero. I'm reading his book on the Middle East at the moment.

What law would you introduce if you could?

I would have two:

1. Prison reform, especially the treatment of young people in the criminal justice system. Starting with rules around obligations to disclose past offences to prospective employers, as barring young people from the jobs market is an own-goal if we are serious about reducing reoffending.

2. Introduce public assemblies to decide on how we want to remember history in public spaces.

Tell us something we might not know about you

I am a keen cross country skier, and have completed the Vasaloppet ultramarathon in Sweden, the Engadin Ski Marathon in Switzerland and am due to do the Birkebeinerrennet in Norway in 2024.

MULTI-TIER DISPUTE RESOLUTION CLAUSES: DRAFTERS BEWARE

Multi-tier dispute resolution clauses are a familiar feature of construction contracts. Parties often find that they are obliged by their contracts to engage in mediation or negotiation before proceeding to litigation or arbitration. Despite some historic animosity to such obligations, the courts in recent years have taken a generally permissive approach to these clauses; they have endeavoured to uphold the parties' agreement.

This article considers a tension at the heart of this approach: the desire on the one hand to give effect to what the parties agreed, and the difficulty on the other hand in giving what they have agreed objective and legally controllable substance. In that context it explores the recent Court of Appeal decision in *Kajima Construction & Anor v Children's Ark Partnership Limited* [2023] EWCA Civ 292. That decision has made clear that, whilst the courts will endeavour to uphold parties' agreements, there are limits.

By William Webb KC & Tom Walker

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Multi-tier dispute resolution clauses: Drafters beware

Multi-tier dispute resolution clauses are a familiar feature of construction contracts. They commonly provide that some stages of the dispute resolution mechanism are a condition precedent to starting formal proceedings. Where the condition involved a reference to an independent tribunal, such as an expert, a dispute board or an adjudicator, the courts have historically found little difficulty in upholding such a requirement by imposing a stay on the proceedings.

However, where the obligation is to engage in mediation or negotiation before proceeding to litigation or arbitration, the enforceability of such clauses has in the past been doubtful because they were said to do no more than express an aspiration to resolve the parties' dispute.

In more recent years the courts have taken a generally permissive approach; they have endeavoured to uphold the parties' agreement. However, the authorities also demonstrate a tension *"between the desire to give effect to what the parties agreed and the difficulty in giving what they have agreed objective and legally controllable substance" (Tang & Anor v Grant Thornton International Ltd & Ors* [2012] EWHC 3198 (Ch) at [56])). This tension was in stark display in the recent Court of Appeal decision in *Kajima Construction & Anor v Children's Ark Partnership Limited* [2023] EWCA Civ 292. This case illustrates that, whilst the courts will endeavour to uphold the parties' agreements, there are limits.

Historic hostility to agreements to negotiate

The enforceability of clauses providing that parties must first seek to negotiate or mediate before commencing proceedings was rendered doubtful by, in particular, two decisions: (1) *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297; and (2) *Walford v Miles* (1991) 62 P & CR 410.

The parties in Courtney & Fairbairn had agreed to *"negotiate fair and reasonable contract sums"* for building works. The Court of Appeal held that this was an unenforceable agreement. Lord Denning MR, giving the leading judgment, was concerned that it amounted to no more than an agreement to agree (at p301-2):

"If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."

The view taken by the Court of Appeal in *Courtney & Fairbairn* was subsequently approved in *Walford v Miles*. This case concerned an agreement not to negotiate with any third party in respect of the prospective purchase of a photographic business (i.e. a 'lock-out' agreement). Mr and Mrs Miles had accepted an offer, subject to contract, to sell their photographic business to the Walford brothers. The price was to be 2 million pounds. In return for the Walfords obtaining a comfort letter from their bank indicating that it would finance the purchase, Mr and Mrs Miles agreed not to negotiate with other potential purchasers. Contrary to this agreement, they went on to sell the business to a third party. The Walfords made two claims for damages. The first was to recover the costs wasted on preparing contract documents. This was said to be £700. The second claim was for the loss of a bargain. Namely, the acquisition of the Miles' business for 2 million pounds when, according to the Walfords, it was worth 3 million pounds. In support of this argument, the Walfords argued that it was an implied term of the lock-out agreement that Mr Miles would continue to negotiate with them in good faith. There was also said to be a further implied term that the negotiations could only be terminated for an honest reason. Lord Ackner, with whom the other law lords agreed, gave this argument short shrift. A bare agreement to negotiate had no legal content. His reasons for this position were twofold. First, a duty to negotiate in good faith was said to be *"inherently repugnant to the adversarial position of the parties when involved in negotiations."* Secondly, such a duty was, in his view, *"unworkable in practice as it is inherently inconsistent with the position of a negotiating party"* (at [1992] 2 AC 128, 138C-H).

Walford v Miles has been the subject of sustained academic criticism (see, for example, A Mills and R Loveridge, *"The uncertain future of Walford v Miles"* [2011] LMCLQ 587). The principal complaint is that it offends a central aim of English commercial law, namely, to uphold parties' agreements.

This aim has been eloquently expressed by Sir Robert Goff (R Goff, *"Commercial Contracts and the Commercial Court"* [1984] LMCLQ 382, 391):

"Our only desire is to give sensible commercial effect to the transaction. We are there to help businessmen, not to hinder them: we are there to give effect to their transaction, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."

It follows that the role of the court is to give effect to what the parties have agreed. The court should not *"throw its hands in the air and refuse to do so because the parties have not made its task easy" (Openwork Ltd v Forte* [2018] EWCA Civ 783 at [27]). Accordingly, where parties intend a clause to create a legal obligation, freedom of contract dictates that the court should endeavour to give legal effect to that intention. To hold that a clause is too uncertain to be unenforceable is, in Lord Denning's memorable words, *"a counsel of despair" (Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 1 Q.B. 933, 943). It should be a last resort.

The permissive approach

Walford v Miles remains good law. However, in line with the criticism set out above, it has been treated as distinguishable in several subsequent cases. The thrust of these decisions is to confine *Walford v Miles* to situations in which there is a mere agreement to negotiate (i.e. where no process or standard is identified). These cases indicate a more permissive approach in which the courts endeavour to enforce the parties' agreement, provided certain minimum requirements are met.

Cable & Wireless Plc v IBM [2002] EWHC 2059 (Comm) is one such case. It considered a clause providing that:

"If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings."

The court held that this clause was enforceable. In so doing, it emphasised the importance of upholding the parties' agreement. Distinguishing the case before it from *Walford v Miles*, the court emphasised that the parties had gone further than a mere agreement to negotiate. They had identified a specific process: *"Resort to*

CEDR and participation in its recommended procedure are, in my judgment, engagements of sufficient certainty for a court readily to ascertain whether they have been complied with" (at p1326). The court emphasised the importance of upholding the parties' agreement: *"English courts should nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references"* (at p1326).

In *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC) Ramsey J set out the minimum requirements for a dispute resolution clause to be enforceable (at [81]):

"It seems to me that considering the above authorities the principles to be derived are that the ADR clause must meet at least the following three requirements: first, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve or at least a model of the process should be set out so that the detail of the process is sufficiently certain."

Similarly, in Tang Hildyard J stated (at [60]):

"In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."

Sulamérica Cia Nacional de Seuros SA and others v Enesa Engelharia SA and others [2012] EWCA Civ 638 provides a contrasting example of a clause being too uncertain, despite the court's best efforts to give it legal force. The Court of Appeal considered a clause requiring the parties to seek to resolve their dispute amicably by mediation prior to commencing arbitration. It noted that there was little doubt that the parties had intended to create an enforceable obligation. Accordingly, *"the court should be slow to hold they failed to do so"* (at [35]). Nonetheless, the clause was held to be too uncertain to be enforceable: *"… in order for any agreement to be effective in law it must define the parties' rights and obligations with sufficient certainty to enable it to be enforced"* (at [35]). Contrary to this, the clause in question provided no defined mediation process. Nor did it refer to the procedure of a specific mediation provider. Similarly, no provision was made for the process by which the mediation was to be undertaken. The clause was not apt to create an obligation to commence or participate in a mediation. At most, it imposed an obligation to invite the other side to join in an ad hoc mediation. However, the content of such a limited obligation would be too uncertain to be enforced (at [36]).

This line of authority was considered in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm). This case concerned a contract for the sale and purchase of iron ore. The contract's dispute resolution clause required the parties to *"first seek to resolve the dispute or claim by friendly discussion"* before commencing arbitration. Following a dispute between the parties, the seller commenced arbitration proceedings. The buyer contended that the arbitrators lacked jurisdiction on the basis that the condition precedent in the dispute resolution clause had not been complied with. There had been no attempt to resolve the dispute by friendly discussions. In response, the seller argued that the clause was too uncertain to be enforceable. Teare J rejected the seller's argument. In holding that the clause was enforceable, he noted (at [40]) that:

"[W]here commercial parties have entered into obligations they reasonably expect the courts to uphold those obligations. The decision in the Walford case arguably frustrates that expectation. For that reason there has been at least one clear indication that the decision in the Walford case may in appropriate circumstances be distinguished…"

Teare J distinguished the clause before him from the one considered in *Sulamérica*. In the absence of a named mediator or an agreed process whereby a mediator could be appointed, the agreement in *Sulamérica* was incomplete. However, an agreement to resolve a dispute by friendly discussions in good faith was not so incomplete (at [60]). Teare J concluded that (at [64]):

"…an obligation to seek to resolve a dispute by friendly discussions has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that a clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction on their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party.

Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration."

Kajima Construction

Whilst the emphasis following *Walford v Miles* has been on upholding parties' agreements, the recent Court of Appeal decision in *Kajima Construction* highlights that there are limits.

Kajima Construction concerned a fire defects claim. On 10 June 2004 Children's Ark Partnership Limited (**"CAP"**) was engaged to design, build, and finance the redevelopment of the Royal Alexandra Hospital for Sick Children (**the "Project Agreement"**). CAP engaged Kajima Construction Europe (UK) Limited to design, construct, and commission the hospital (**the "Construction Contract"**). CAP subsequently entered into a deed of guarantee with the second appellant, Kajima Europe (collectively **"Kajima"**), by which the second appellant agreed to guarantee the due and punctual performance by Kajima Construction of each and all of its duties or obligations to CAP under the Construction Contract. Schedule 26 of the Construction Contract included a dispute resolution procedure in the following terms:

"3.1 Subject to paragraph 2 and 6 of this Schedule, all Disputes shall first be referred to the Liaison Committee for resolution. Any decision of the Liaison Committee shall be final and binding unless the parties otherwise agree.

3.2 Where a Dispute is a Construction Dispute the Liaison Committee will convene and seek to resolve the Dispute within ten (10) Business Days of the referral of the Dispute."

Schedule 26 did not itself define "Liaison Committee". This was instead defined in Schedule 1 as "…the committee referred to in clause 12 (Liaison Committee) of the Project Agreement". Clause 12 of the Project Agreement provided, in relevant part, as follows:

"12.1 The Trust and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "Liaison Committee"), consisting of three (3) representatives of the Trust (one of whom shall be appointed Chairman) and three (3) representatives of Project Co which shall have the functions described below.

12.2 The functions of the Liaison Committee shall be:

…

(c) in certain circumstances, pursuant to Schedule 26 (Dispute Resolution Procedure), to provide a means of resolving disputes or disagreements between the parties amicably."

Following the Grenfell Tower tragedy in 2017, defects were identified in respect of the cladding and fire stopping works at the hospital. CAP issued proceedings on 21

December 2021. Kajima applied to strike out the claim on the basis that CAP had not complied with the dispute resolution clause.

At first instance Joanna Smith J dismissed the strike out application and granted CAP's cross-application for a stay. She held that, whilst the dispute resolution clause gave rise to a condition precedent, it was unenforceable.

Joanna Smith J's decision was upheld on appeal. Coulson LJ delivered the lead judgment and considered that various factors pointed to the dispute resolution procedure being unenforceable. In particular, the competing interpretations of the reference to *"the parties"* in paragraph 3.1 of Schedule 26 of the Construction Contract were both unworkable.

Kajima argued that *"the parties"* was a reference to the Trust and CAP, not Kajima. However, that would mean that Kajima had to take part in a process the result of which it would not be bound by. That made no commercial sense (at [50]). The alternative interpretation that it was a reference to CAP and Kajima produced a further set of difficulties. Kajima would be bound by the decision of the Liaison Committee, on which it had no representative, whose meetings it had no right to attend, whom it could not make representations to and whose documents it was not entitled to see. This could not possibly lead to the *"amicable settlement"* identified as an outcome of the provisions (at [51]). In the circumstances, the Court of Appeal saw the force in Kajima's submission that actual, or at least perceived, bias would be inherent in the process (at [52]). Accordingly, it concluded that the Liaison Committee was a fundamentally flawed body. It could neither resolve a dispute involving Kajima *"amicably"*, nor could it fairly provide a decision binding in any event (at [53]). It was *"pointless"* (at [50]).

The process prescribed by the dispute resolution procedure was also too uncertain. It was not at all clear when the condition precedent might be satisfied. For example, it was impossible to see what, if any, minimum participation was required. The Court of Appeal noted that if, as was suggested by Children's Ark, Kajima's minimum duty was non-existent or zero, that could hardly represent an effective dispute resolution process (at [56]). Further, whilst Schedule 26 required the Liaison Committee to try to resolve the dispute within ten days of referral, the Project Agreement allowed them 10 days' notice before they even had a meeting. Accordingly, the process could be over before it had even begun (at [57]).

Further, it was not possible to render the dispute resolution procedure enforceable by looking at the parts that could work in isolation.

It was necessary for the court to treat the process as a whole to see whether or not it was enforceable. It was not permissible to rely on some terms and disavow others in an attempt to produce an enforceable procedure (at [70] to [71]).

In reaching its conclusions, the Court of Appeal emphasised that, whilst the court must endeavour to enforce the agreement between the parties, it should not overstrain itself to do so, so as to arrive at an artificial result (at [70]). It also concluded that it was permissible for the court to have a *"weather eye to the utility"* of a dispute resolution procedure (at [74]).

It can, however, be noted that Popplewell LJ formed a somewhat different view to the majority of the Court of Appeal. He considered that there was a construction of the clause which would render it sufficiently certain to be effective and enforceable – namely that it was only the commencement of the DRP process which was required (at [130]) with a wide ranging appeal to business common sense being used to create an effective process thereafter (at [125-127]). However, this construction was not one which had been reached by the trial judge or advanced by Kajima. Therefore, it was not covered by the grounds of appeal such that Popplewell LJ ultimately considered himself constrained to concur with the majority in terms of the outcome (at [132]).

It could be said that Popplewell LJ's judgment is most in line with the general trend towards straining to enforce the parties' agreements wherever possible, no matter how poorly worded. However, it also highlights the difficulties with that approach in this particular context. Where a clause is a condition precedent to litigation, the parties need to be able to act in reliance upon a clause in order to preserve their legal rights. However, where the requirements of the clause are vague or absurd, it may be more appropriate for the courts to simply set the clause aside than seek to use business common sense to glean a meaning which may not have been foreseen by either party.

This may explain why the courts appear more willing to strike down as ineffective unclear conditions precedent to litigation than other contract terms, and may explain why the majority of the Court of Appeal in this case differed from Popplewell LJ's analysis.

Concluding thoughts

The trend since *Walford v Miles* has been for the courts to endeavour to enforce dispute resolution clauses. However, *Kajima Construction* has provided a salutary shot across the bows for contract drafters. The Court of Appeal has made clear that there are limits to how far the court will indulge the parties' agreement. The court will not *"overstrain itself"* to arrive at an artificial result. It will also have an eye to whether enforcing the clause would be pointless. Drafters are, therefore, well advised to not only provide a sufficiently detailed process, but also one that has a clear utility.

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