

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Outotec (USA) Inc & Anor v MW High Tech Projects UK Limited [2024] EWCA Civ 844

The Respondent was engaged as the main contractor in the construction of a power plant. It engaged the First Appellant as a sub-contractor, with the Second Appellant, the parent company, providing a guarantee to the Respondent.

Following a delay in the construction works, the Respondent's main contract was terminated by the employer. Proceedings were commenced by the employer against the Respondent in respect of the delays and the consequences of termination. The Respondent defended these proceedings and brought a Part 20 claim against the First Appellant. Adverse findings were made against the Respondent in this action. In particular, it was found that the employer had been entitled to terminate the main contract.

Following these findings, the Respondent commenced proceedings against the Appellants claiming the sum of £179m and alleging that it had been induced to enter into the main contract and the sub-contract with the First Appellant on the basis of fraudulent or negligent misrepresentations. The Appellants applied for strike out on the grounds that these proceedings were an abuse of process and ought to have been raised in the earlier proceedings, in breach of the guidelines set out by the Court of Appeal in the case of *Aldi Stores Limited v WSP Group plc*.

The High Court refused the application because the position between the Respondent and Appellants during the pre-contractual stages of the agreement (which was relevant to the question of misrepresentation) had not been in issue in the main action and did not therefore involve the re-litigation of these issues. While the Judge decided that

the Respondent had breached the *Aldi* guidelines in failing to raise these issues in the earlier proceedings, this failure did not merit strike out. The Appellants appealed.

The Appeal was dismissed. It was held that a breach of the *Aldi* guidelines did not automatically justify the striking out of a new claim as an abuse of process. The *Aldi* guidelines are only one factor in a broad, merits-based evaluation. It would be rare for a court to find an abuse in the absence of factors such as vexation, harassment, or oppression.

Adrian Williamson KC, Paul Bury and John Steel represented the Appellants.

Augusta 2008 LLP (formerly Simply Construct (UK) LLP) v Abbey Healthcare (Mill Hill) Ltd [2024] UKSC 23

The Supreme Court considered: (1) statutory interpretation, i.e. the meaning of s.104 and Part II of the Housing Grants, Construction and Regeneration Act 1996 ('the Act'); and (2) contractual interpretation, i.e. whether the collateral warranty in this case, executed long after the execution of works, was a construction contract within the meaning of s.104 and Part II of the Act.

Overturning the decision of the Court of Appeal (per Peter Jackson and Coulson LJ, Stuart-Smith LJ dissenting), the Supreme Court held that the warranty was not within the scope of Part II of the Act. The Court overruled *Parkwood Leisure v Laing O'Rourke* [2013] BLR 589, and held:

- A collateral warranty will be an agreement "for ... the carrying out of construction operations" if it is an agreement by which the contractor undertakes a contractual obligation to the beneficiary to carry out construction operations which is separate and distinct from the contractor's obligation to do so under the building contract.

- A collateral warranty where the contractor is merely warranting its performance of obligations owed to the employer under the building contract will not be an agreement "for" the carrying out of construction operations.

Alexander Nissen KC and Tom Owen KC represented the Respondent.

CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities [2024] EWCA Civ 730

The Claimant, a property developer, appealed against the refusal of its judicial review application, which sought to overturn a decision by the Secretary of State's planning inspector. The inspector declined to discharge certain conditions attached to a planning permission for a mixed-use development in Somerset.

The Court of Appeal dismissed the appeal.

On their true interpretation, the Conservation of Habitats and Species Regulations 2017 reg.63 and reg.70 allowed for an appropriate assessment to be undertaken when the discharge of conditions was being considered in a multi-stage process. Indeed, where the provisions for appropriate assessment were engaged, reg.63 and reg.70 had the effect of requiring such an assessment to be carried out before development was authorised to proceed by the implementing decision. Where an appropriate assessment was required before an implementing decision was made, the assessment had to be of the whole development whose implementation was authorised by that decision, not just of the matters affected by the conditions for discharge.

Lord Banner KC represented the Appellant.

Lancashire CC v Brookhouse Group Ltd [2024] EWCA Civ 717

A local authority appealed against the refusal of its application to strike out proceedings brought against it under the

[Public Contracts Regulations 2015](#) by the Respondent.

The Court of Appeal dismissed the appeal.

The 30-day time limit under reg.93(5) of the Public Contracts Regulations 2015 ('PCR') for seeking a declaration of ineffectiveness under reg.99, running from an interested economic operator being given the 'relevant reasons' it had been unsuccessful, did not apply where the declaration was sought on the ground that no contract notice had been published despite one having been required. In such a case, the limitation period was six months from the contract being entered into, unless the contracting authority issued a contract award notice, where the period is 30 days from when the contract was published.

Rhodri Williams KC and Tom Walker represented the Appellant.

A&V Building Solutions Ltd v J&B Hopkins Ltd [2024] EWHC 1510 (TCC)

This case is the judgment following trial of the disputes between the parties, after four prior judgments concerning enforcement of an adjudicator's award and interlocutory matters. The issue arose from the taking of a final account under a construction sub-contract for plumbing works carried out by A&V at a new student accommodation development, known as the Moulsecoomb Campus, for the University of Brighton.

The Court considered in detail the factual circumstances, which included issues of delay, whose responsibility that was, lack of proper notice for work and also allegations of inferior quality work.

The TCC ruled that J&B committed repudiatory breach of contract by preventing A&V from completing plumbing works at the Moulsecoomb Campus project. As a result, A&V was entitled to accept the repudiation and cease work.

James Frampton represented the Defendant.

R (on the application of Birmingham City Council) v Secretary of State for Transport [2024] EWHC 1487 (Admin)

The Claimant local authority had entered into an agreement with a contractor for a 25-year project for the design, build, financing and maintenance of a highway network and related infrastructure. They applied for judicial review of the Defendant Secretary of State's decision not to support the revised highways maintenance private finance initiative (PFI) arrangement proposed by the local authority.

The Court granted their application. It was held that the terms of a letter

from the Transport Secretary to a local authority confirming that PFI credits had been issued towards the capital costs of a highways project, along with the Local Government Support PFI Project Guide, had not created a legitimate expectation that, if the PFI contract was terminated or varied, the government would only withdraw credits in exceptional circumstances. However, it also held that withdrawing the credits without offering the local authority a further opportunity to make representations was procedurally unfair.

Sarah Hannaford KC represented the Defendant.

ISG Retail Limited v FK Construction Limited [2024] EWHC 878 (TCC)

The Claimant, ISG, sought declarations that FK had failed to comply with an alleged condition precedent to its entitlement to loss and expense in order to overturn part of an adjudicator's decision.

The Court decided that issues concerning the validity of notices of delaying events and issues of waiver and estoppel in connection with compliance with conditions precedent were likely to involve substantial disputes of fact and therefore entirely unsuitable for determination in Part 8 proceedings. It was also argued that when a dispute was taken to litigation for final determination, it ought to be the whole of the dispute originally adjudicated. The Court (obiter) rejected that argument. Permission to Appeal was not sought at handing down.

Simon Hargreaves KC and James Frampton represented the Defendants.

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC)

The Court rejected a contractor's argument that a final payment notice was not subject to any financial adjustment due to a conclusive evidence provision in a JCT sub-contract, granting summary judgment to the sub-contractor to enforce an adjudicator's decision determining the true value of the final sub-contract sum. [See article at page 4]

Lucy Garrett KC represented the Part 8 Claimant/Part 7 Defendant.

Bellway Homes Ltd v Surgo Construction Limited [2024] EWHC 269 (TCC)

In proceedings brought by Bellway to enforce an adjudicator's decision, the Court held that the contractual

adjudication provisions did not fall foul of the requirements of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") despite the provisions allowing for: (i) the service of the Referral "as soon as reasonably possible after" the Notice of Adjudication rather than within 7 days, and (ii) the appointment of an adjudicator from Bellway's panel of adjudicators.

The Court went on to find that even though the adjudicator had been appointed under the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") instead of the contractual adjudication provisions which Bellway would have been entitled to refer the dispute under, it made no material difference in this case whether the referral was under the Scheme or contractual adjudication provisions and there was therefore no defence to enforcement of the decision.

Brenna Conroy represented the Defendant.

Triathlon Homes LLP v Stratford Village Development Partnership & Others [2024] UKFTT 26 (PC)

This was the first major case in which the First Tier Tribunal ("FTT") (made up of the President of the Lands Chamber, Edwin Johnson J, and its Deputy President, Martin Rodger KC) had to consider applications for a remediation contribution order ("RCO") under section 124 of the Building Safety Act 2022 ("the BSA"). The applications concerned the cost of rectifying fire safety defects in five tower blocks in the former Olympic Village in Stratford, London ("the Blocks"), one application per Block. They were made by Triathlon Homes LLP ("Triathlon"), who is the long leaseholder of all the social and affordable housing in the Blocks. The Blocks had been developed by the First Respondent ("SVDLP"), which is a limited partnership whose three partners are ultimately owned (through subsidiaries) by the Second Respondent ("Get Living").

There was no dispute between the parties that the "jurisdictional" or "gateway" requirements which need to be met before an RCO can be made had been satisfied. The principal issue between the parties was whether it was "just and equitable" to make the order sought in respect of the remedial work that is currently being carried out to the Blocks. In reaching its Decision, the Tribunal considered a number of common arguments about the extent of the jurisdiction and the just and equitable test.

Alexander Nissen KC represented the Applicant. Jonathan Selby KC represented the First and Second Respondents.