

## Introduction to the Law of Contract and Fundamental Themes

### Good faith and English law

In *Astra Asset Management v Co-Operative Bank* [2019] EWHC 897 (Comm) the judge (Andrew Henshaw QC, sitting as a Judge of the High Court) was required to consider (in the context of an application for summary judgment) whether an exclusivity agreement, in which the parties committed to a period of negotiation, contained an obligation to negotiate in good faith to conclude a transaction. The argument was advanced on the basis of both an express obligation and an implied obligation to negotiate in good faith.

The judge dismissed the possibility that the parties' statement in the exclusivity agreement that they "are entering into this agreement in good faith and are relying on its terms" amounted to an obligation to negotiate in good faith. In particular, he explained, at [111]-[117]:

- (1) The language was that of the parties' general approach to the obligations in the exclusivity agreement as opposed to an obligation itself and none of the parties' specific obligations in the agreement itself included an obligation to negotiate in good faith to conclude a transaction.
- (2) Such an obligation would be inconsistent with the "subject to contract" basis on which the parties were proceeding.
- (3) Such an obligation would be inconsistent with other provisions of the agreement.
- (4) Such an obligation would amount to an unenforceable "agreement to agree" according to *Walford v Miles* [1992] 2 A.C. 128 at 138.
- (5) The facts did not fall within *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 because too many essential aspects of any final agreement remained to be settled.

The judge also rejected, at [124]-[127], the possibility that such an obligation arose as an implied term: such a term would be inconsistent with the parties' express terms and, in any event, it did not satisfy the test for the implication of terms (that is, it was not necessary to give business efficacy to the exclusivity agreement and it was not so obvious as to go without saying that the parties intended its inclusion).

Detailed analysis of what amounts to a relational contract is contained in the judgment of Fraser J in *Bates v Post Office Ltd (No.3)* [2019] EWHC 606 (QB). The facts concerned group litigation between the Post Office and a number of sub-postmasters and raised a number of legal issues relating to alleged defects in an electronic accounting system. The Post Office alleged that these defects had caused shortfalls for which the sub-postmasters should be held liable. One of the matters to resolve was whether the parties' contracts were relational contracts which contained implied terms amounting to obligations to act in good faith. The judge answered this in the affirmative. The following points may be extracted from Fraser J's analysis:

- (1) The concept of a relational contract does exist as a distinct category of contract (at [705]).
- (2) A possible imbalance of power between the parties is not relevant to the question whether the contract is a relational contract (at [722], [724]).

(3) Good faith means more than “honesty” (at [706]-[711]). It was explained, at [738], that the good faith obligation:

“means that both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith”.

(4) Once it is found that a contract is a relational contract, that contract *necessarily* contains a good faith obligation as an implied term (at [711], [717], [720], [738]).

The conclusion at (4) is particularly noteworthy. It suggests the good faith requirement is a term implied by *law* as a necessary incident of the finding that a contract is a relational contract. This is also supported by Fraser J’s observation, at [743], when considering the argument that certain terms should be implied into the contracts on the facts, that it was necessary to consider whether such implied terms are “simply consequential upon my finding that these are relational contracts” and, if not, whether they should “be implied terms because they are necessary to give business efficacy to the contracts” (according to the usual test for implied terms). He then went on to hold, at [746], that 17 of the 21 terms which it was alleged should be implied were “consequential upon...or incidents of” the “finding that these are relational contracts”. In other words, as the contracts were found to be relational contracts, they necessarily contained an obligation of good faith, and it followed that 17 of the specific terms were implied terms within the contracts within the umbrella of “good faith”.

In addition, at [725], the judge set out a non-exhaustive list of “characteristics” which are relevant to whether a contract is a relational contract:

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

On the facts, the presence of these characteristics (as well as additional features of the specific facts explained at [728]-[729]) meant the contracts were relational contracts, with an implied obligation of good faith which covered 17 of the terms it was alleged should be implied.

The question whether a good faith obligation should be found as an implied term was also considered in *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch). Fancourt J recognised that in *Al Nehayan v Kent* [2018] EWHC 333 (Comm) Leggatt LJ had found that a good faith obligation was an implied term of the contract in that case as a matter of fact, but also held that such a term would be implied as a matter of law, on the basis the contract was a relational contract. Fancourt J explained that a relational contract of the kind described by Leggatt LJ in *Al Nehayan* will, as a matter of law, include an implied term of good faith; but cautioned, at [200], that the type of contract which will attract such an implied term:

“is not any contract that involves a long-term relationship between the parties; it is a contract that requires the parties to collaborate in future in ways that respect the spirit and objectives of their joint venture *but which they have not specified or have been unable to specify in detail*, and which involves trust and confidence that each party will act with integrity and cooperatively” [original emphasis].

This meant (as the judge explained, at [200]-[202]) that different contracts might be characterised as “relational”, but not all such contracts are of the narrow “relational” kind that attracts an implied obligation of good faith. See also *Taqa Bratani Ltd v RockRose UKCS8 LLC* [2020] EWHC 58 (Comm) at [54]-[56].

In *UTB*, Fancourt J expressed a preference, at [203]-[204], for addressing the question whether a good faith obligation should be found as an implied term by applying the test for implied terms in fact (an approach since endorsed by Falk J in *Russell v Cartwright* [2020] EWHC 41 (Ch) at [87]). Applying that approach to the facts of *UTB*, Fancourt J concluded there was no implied obligation of good faith.

In addition, the judge emphasised the importance of studying the express terms of the contract in order to ascertain whether an implied obligation of good faith should be found. Consistent with the first factor identified by Fraser J in *Bates* (above), he noted, at [201], “there must be no express term of the contract that prevents a duty of good faith being implied”. He also pointed out on the facts, at [207], the significance of the parties having included two specific good faith obligations as express terms relevant to two particular matters. This demonstrated that the parties *had* turned their minds to the issue of good faith and had concluded it was relevant only in the two specific contexts, which suggested a more general obligation should not be found as an implied term. According to Fancourt J, there was “an argument that where the parties meant to impose an obligation of good faith they did so, that elsewhere they did not intend any such obligation to exist, and that implying a more general good faith obligation would be inconsistent” with what they had expressly agreed. The fact the contract was “extremely detailed and professionally (and skilfully) drafted” was another reason against the finding of an implied term (at [206]).

For a similar conclusion that the parties’ inclusion of specific good faith obligations as express terms pointed against the recognition of a general good faith obligation as an implied term, see *Teesside Gas Transportation Ltd v Cats North Sea Ltd* [2019] EWHC 1220 (Comm) at [38] per Butcher J (affirmed [2020] EWCA Civ 503 without discussion of that point) and *Russell v Cartwright* [2020] EWHC 41 (Ch) at [89] per Falk J.

One of the consequences of the recognition of the relationship between relational contracts and implied terms of good faith is the fact it is increasingly common to find that parties allege that

a contract is “relational” in order to rely on an implied good faith provision. In response, the courts have been careful to confine the scope of relational contracts. For example, in *Morley v The Royal Bank of Scotland plc* [2020] EWHC 88 (Ch), Kerr J held on the facts that the loan agreement, being an ordinary loan facility agreement, was not a relational contract.

In *New Balance Athletics Inc v Liverpool Football Club and Athletic Grounds Ltd* [2019] EWHC 2837 (Comm) arose the issue of the correct approach to ascertaining whether a party had acted in accordance with a good faith obligation. New Balance was the sponsor of Liverpool Football Club. The sponsorship contract entitled New Balance to renew the contract if it were able to match any offer made by a competitor. Such a competitor, Nike, made an offer and the court was required to decide whether New Balance’s offer matched that of Nike. Liverpool preferred the Nike offer and alleged that certain aspects of the New Balance offer concerning the proposed “distribution” of Liverpool products had not been made in good faith, in essence because Liverpool was of the view that New Balance would not actually be able to fulfil the terms of the offer, which meant New Balance had not matched the Nike offer. New Balance accepted it had an obligation to make the offer in good faith, so the relevant question was whether it had done so. Teare J referred to the judgment of Fraser J in *Bates* (above) and explained, at [44], that a “duty of good faith (or fair dealing) can be breached not only by dishonesty but also by conduct which lacks fidelity to the parties’ bargain”. He explained that in identifying conduct that lacks fidelity to the bargain, it is “necessary to bear in mind the nature of the bargain, the terms of the contract and the context in which the matter arises”, with the ultimate question being “whether reasonable and honest people would regard the challenged conduct as commercially unacceptable”. In relation to this question, he explained, at [69]:

“[I]f New Balance did not in fact intend to meet or knew that it could not meet the distribution obligation then it would be acting dishonestly, which would be in breach of the implied duty of good faith. However, if New Balance honestly believed that it could meet the distribution obligation but its grounds for so believing were unreasonable then I do not consider that it would be acting in breach of the implied duty of good faith. Its conduct would be innocent, albeit careless or unwise. I do not consider that reasonable and honest people would regard such conduct as lacking fidelity to the parties’ bargain or “commercially unacceptable” though they would no doubt regard it as imprudent. [Liverpool] submitted that what would be in breach of the implied duty of good faith would be to be reckless, or not to care, as to whether or not New Balance could meet the distribution obligation. I accept that submission for in that state of mind there is in truth no belief that New Balance could meet the distribution obligation. Reasonable and honest people would, in my judgment, regard such conduct as commercially unacceptable and not faithful to the parties’ bargain.”

On the facts, the conduct of New Balance was not “commercially unacceptable” and so it had not breached the good faith obligation. Nonetheless, Liverpool succeeded on a different ground in relation to the “marketing” aspects of the New Balance offer. Nike had stated it could use global superstar athletes “of the calibre of LeBron James, Serena Williams, Drake etc” and Liverpool claimed—and the judge accepted—that this was something New Balance was unable to match.

For analysis of the role of good faith in the context of restraints on contractual “choices” (or “discretions” or “powers”), see *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718, [2020] Q.B. 418 at [106]-[118] per Males LJ. A good faith obligation was implied by which insurers’ rights to present a reinsurance claim had to be exercised in a manner which was not arbitrary, irrational, or capricious. See also at [148]-[162] per Leggatt LJ (Patten LJ agreed with both judgments). An appeal is due before the Supreme Court. See also *Taqa Bratani Ltd v RockRose UKCS8 LLC* [2020] EWHC 58 (Comm) at [44]-[53] and *Multiplex Construction Europe Ltd v R&F One (UK) Ltd* [2019] EWHC 3464 (TCC).

In the context of good faith performance in contracts, also noteworthy is the UK government’s guidance in relation to the Covid-19 pandemic, “Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency”. The guidance is non-binding, but sets out “strongly encouraged” examples of “responsible and fair contractual behaviour” and is underpinned by good faith: <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency>.

### Agreement

#### **The objective approach to determining the existence of agreement**

For a discussion of the approach to formation in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co. KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753, see *Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 (TCC).

#### **Recognised instances of offer or invitations to treat**

In *National Car Parks Ltd v Revenue & Customs Commissioners* [2019] EWCA Civ 854, Newey LJ (Patten and Males LJJ agreeing) explained the process of offer and acceptance in the context of car parking ticket (“pay and display”) machines. The court contemplated the following hypothetical scenario:

“A customer enters [a] pay and display car park wishing to park for one hour. She parks her car in an available space and locates the pay and display ticket machine. The prices stated on the tariff board next to the pay and display ticket machine are: Parking for up to one hour – £1.40. Parking for up to three hours – £2.10. The pay and display ticket machine states that change is not given but overpayments are accepted and that coins of a value less than 5 pence are not accepted. The customer finds that she only has change of a pound coin and a fifty pence piece and puts these into the pay and display ticket machine. The machine meter records the coins as they are fed into the machine, starting with the pound coin. When the fifty pence piece has been inserted and accepted by the machine, the machine flashes up ‘press green button for ticket’ which the customer does. The amount paid is printed on her ticket, as is the expiry time of one hour later. The customer displays the ticket in her car and leaves the car park.”

In such a scenario, it was said (at [18]-[20]):

“[T]he contract was brought into being when the green button was pressed. On that basis, the pressing of the green button would represent acceptance by the customer of an offer by [the car park operator] to provide an hour’s parking in return for the coins that the customer had by then paid into the machine...the offer made by [the car park operator is] to grant the right to park for an hour in return for the coins shown by the machine as having been inserted when the green light flashes. That is the offer which the customer accepts.”

On the facts, this meant an “overpayment” by the customer (10 pence in the hypothetical example) —which was retained because the machine did not offer change—was necessarily part of the consideration under the contract and was accordingly taxable.

### **Certainty and Intention to Create Legal Relations**

#### **“Subject to contract” negotiations**

For analysis of the authorities explaining the courts’ approach to “subject to contract” negotiations, see *Astra Asset Management v Co-Operative Bank* [2019] EWHC 897 (Comm). There, the judge (Andrew Henshaw QC, sitting as a Judge of the High Court) held (in an application for summary judgment), at [85], that the expression “subject to contract”:

“is indeed a legal term of art, with an established meaning. It is widely used in commercial transactions, both within and outside the property world. To disapply or depart from its established meaning without a very good reason would be liable to disappoint the reasonable expectations of parties engaged in commercial discussions. The “subject to contract” basis of proceeding serves an important purpose by enabling parties to control and be certain about the stage at which they become legally bound. Among other things, it protects them from the risk that a contract is inadvertently made during the course of discussions—whether face to face, by telephone or by letter/email—in the course of negotiations: i.e. from the risk that a party says something which objectively construed amounts to a binding offer or acceptance but which that party did not in fact intend to result in a contract. The “subject to contract” basis avoids the need for negotiating parties to take care over every word or phrase used in discussion/negotiations in order to avoid becoming prematurely contractually bound, and to avoid prolonged and expensive litigation about whether or not a contract has been made.”

#### **Incompleteness**

For an illustration of the extent to which the courts will seek to avoid the finding that an agreement is unenforceable due to an absence of certainty, see *Wells v Devani* [2019] UKSC 4, [2020] A.C. 129.

#### **Recovery where a contract fails to materialise**

For an analysis of the case law relating to claims for the recovery of expenses on a restitutionary basis in the context of services provided under an anticipated contract, see *Astra Asset Management v Co-Operative Bank* [2019] EWHC 897 (Comm) at [142]-[178] (where, on the facts, the judge refused to give summary judgment in respect of such a claim).

### **Enforceability of Promises: Consideration and Promissory Estoppel**

#### **Promises to accept less**

The decision in *Simantob v Shavleyan* [2018] EWHC 2005 (QB) has been upheld by the Court of Appeal: [2019] EWCA Civ 1105, emphasising, at [50], “the public policy in favour of holding people to their commercial bargains”.

### **Intention to be Legally Bound, Formalities, and Capacity to Contract**

#### **Instances in which there are requirements of form in English law**

In *Neocleous v Rees* [2019] EWHC 2462 (Ch), [2020] 2 P. & C.R. 4, HHJ Pearce held that an automatically generated email footer containing the name, role, and contact details of the sender rendered the document “signed” for the purposes of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, where the inclusion of the name was for the purpose of giving authenticity to the document.

The applicability of section 4 of the Statute of Frauds 1677 was considered in *Abbi v Slade* [2019] EWCA Civ 2175. The facts concerned an oral agreement between a solicitor and a client’s son-in-law, by which the son-in-law agreed to pay the solicitor’s fees, via a transfer of the relevant money to the client (his father-in-law), if the solicitor agreed to represent his father-in-law as a client in relation to litigation concerning family property. The question arose whether the son-in-law’s promise to pay was a guarantee and so required to be in writing in accordance with section 4. The Court of Appeal held that as the son-in-law’s promise to pay was not conditional on a failure to pay by the client and rather was a commitment to putting the client in funds irrespective of his ability to pay, it amounted to a funding arrangement rather than a guarantee, and so was enforceable in the absence of writing. It followed that the arrangement, not being a guarantee, was not one to which section 4 applied.

### **Content of the Contract and Principles of Interpretation**

#### **Collateral warranties**

For analysis of the case law involving collateral warranties, see *New York Laser Clinic Ltd v Naturastudios Ltd* [2019] EWHC 2892 (QB) at [34]-[66].

#### **The parol evidence rule and “entire agreement” clauses**

In *The Federation of Nigeria v JP Morgan* [2019] EWHC 347 (Comm), [2019] 1 C.L.C. 207 arose the question to what extent terms implied by law are excluded by an entire agreement clause. The judge (Andrew Burrows QC, sitting as a Judge of the High Court) held, at [37]:

“[W]here the entire agreement clause will have the effect of excluding an implied term that would otherwise arise, one should recognise that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. The more valuable the right, the clearer the words will need to be. It follows that an entire agreement clause may or may not exclude an implied term. This will primarily depend on the words used, in their context, but it will also be relevant to consider, for example, the nature of the implied term. So it may be that a term implied by law, at common law or by statute, as opposed to some terms implied by fact or by custom, confers a particularly valuable right so that it is unlikely that a party has agreed to give up that right other than by clear wording.”

This was endorsed by the Court of Appeal (Coulson and Longmore LJ agreeing with Lewison LJ) in *NHS Commissioning Board v Vasant (t/a MK Vasant and Associates)* [2019] EWCA Civ 1245, [2020] 1 All E.R. (Comm) 799 at [51], where it was also said: “An entire agreement clause does not preclude the implication of a term that is intrinsic to the agreement...or one that is necessary to give business efficacy to the contract”.

For a recent discussion of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] A.C. 119 in the context of modification clauses, see *NHS Commissioning Board v Vasant (t/a MK Vasant & Associates)* [2019] EWCA Civ 1245, [2020] 1 All E.R. (Comm) 799 at [32]-[35].

### The effect of signature

In *Wallis Trading Inc v Air Tanzania Co Ltd* [2020] EWHC 339 (Comm), Butcher J found (*obiter*) that a contractual estoppel applied to prevent one of the parties (ATCL) succeeding in arguments based on the invalidity of a lease by reason of its non-compliance with Tanzanian procurement legislation. The judge held, at [79]:

“This is because under clause 2.1 of the Lease ATCL represented and warranted that the Lease was a legal, valid and binding obligation on it, and that the entry into and performance of the Lease did not conflict with any laws binding on ATCL (such as the Defendants now contend the Procurement Legislation to have been). ATCL also represented and warranted that all required authorisations, consents, registrations and notifications in connection with the entry into, validity and enforceability of the Lease had been or would by the Delivery Date have been obtained or effected, which would embrace any necessary consents or authorisations in relation to the Procurement Legislation. Those representations gave rise to an estoppel upon entry into of the Lease, in the manner explained in *Peekay International v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386 at [56]-[57] per Moore-Bick LJ, and *First Tower Trustees Ltd v CDS* [2019] 1 W.L.R. 637 at [44]-[48] per Lewison LJ and [91]-[95] per Leggatt LJ.”

### **Incorporation of written terms into an oral contract through reasonable notice**

In *Hamad M Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 574 (TCC), the claimant wished to purchase machinery from the defendant. The defendant supplied a quotation and in addition directed the claimant to “see attached general terms and conditions of sale”. No such general terms and conditions of sale were actually attached, although they had been attached to an earlier quotation. The claimant placed an order with the defendant. Within the general terms and conditions of sale attached to the earlier quotation was an exclusion clause on which the defendant subsequently sought to rely to meet the claimant’s claim for breach of contract. That raised the question whether the general terms and conditions of sale—and, hence, the exclusion clause—had been incorporated into the parties’ contract. The judge, Sir Antony Edwards-Stuart, held that they had not been incorporated. This was because, on the facts, the reasonable businessperson would not have understood that the earlier attachment was to be treated as incorporating the general terms and conditions of sale. The judge did, however, make clear that this was dependent on the facts and, in certain circumstances, the omission of the attachment might not mean that the terms were not incorporated. For example: “If there had been a significant history of negotiations during which [the defendant] had attached to every quotation a copy of its terms and conditions and had made reference to them in each quotation, then there would be quite a strong case for saying that the failure to attach the terms and conditions to one particular quotation would be seen by the reasonable businessman as an oversight” (at [179]).

*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433 was considered in *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 (QB). A clause in a Conditional Fee Agreement (CFA) between a client and his solicitor provided that the agreement would end if the client died before his claim for damages for personal injury was concluded, with his solicitors entitled to recover their basic charges up to the date of death from his estate. The question arose whether this was unenforceable according to *Interfoto*. The judgment of Pushpinder Saini J contains, at [75]-[90], detailed analysis of that principle and its application to the facts. The judge concluded that the particular clause was enforceable, noting, at [80], that the “CFA also said on its face that it was a binding legal agreement which the client was asked to read carefully before signature”. It was also held, at [86], that the clause could not be said to be onerous or unusual; noting, in particular, that the clause was taken from the Law Society’s Model CFA for use in personal injury claims and represented a “fair allocation of risks”. The judge additionally held, at [91]-[103], that the clause was not rendered invalid by section 62 of the Consumer Rights Act 2015.

The judgment of Fraser J in *Bates v Post Office Ltd (No.3)* [2019] EWHC 606 (QB) also contains detailed analysis of the approach to onerous and unusual clauses. The judge concluded that certain clauses on the facts were onerous or unusual (see from at [957]), but also emphasised the significance of signature (following *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd’s Rep. 511) as a means of ensuring some of the clauses were incorporated (see, e.g., at [1055]). See also the discussion in *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm), [2019] 2 Lloyd’s Rep. 431 at [489]-[512].

### **The courts’ approach to the interpretation of contracts**

For an analysis of the approach to ascertaining what amounts to admissible background evidence, see the judgment of Hildyard J in *Lehman Brothers International (Europe) (In Administration) v Exotix Partners Iip* [2019] EWHC 2380 (Ch) at [109]-[116]. See also *Harcus Sinclair Iip v Your Lawyers Ltd* [2019] EWCA Civ 335, [2019] 4 W.L.R. 81 at [54]-[62] (appeal to the Supreme Court outstanding).

For the approach to interpreting contracts post-*Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619, see *Spirit Energy Resources Ltd v Marathon Oil U.K. LLC* [2019] EWCA Civ 11 (emphasising the primacy of language used). And, in *First National Trustco (UK) LTD v McQuitty* [2020] EWCA Civ 107, Peter Jackson LJ (Asplin and Henderson LJJ agreeing) summarised the approach to contractual interpretation, at [33], as follows:

“When construing a document the court must determine objectively what the parties to the document meant at the time they made it. What they meant will generally appear from what they said, particularly if they said it after a careful process. The court will not look for reasons to depart from the apparently clear meaning of the words they used, but elements of the wider documentary, factual and commercial context will be taken into account to the extent that they assist in the search for meaning. That wider survey may lead to a construction that departs from even the clearest wording if the wording does not reflect the objectively ascertained intention of the parties.”

### The admissibility of pre-contractual negotiations

In *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526, Leggatt LJ (Longmore and David Richards LJJ agreeing) emphasised the distinction between the admissibility of parties’ previous communications (or pre-contractual negotiations) when used as evidence to identify the “genesis and aim of the transaction” as a whole and the admissibility of parties’ previous communications when used as evidence to “show what the parties intended a particular provision in a contract to mean”. As he explained, at [53]-[54], previous communications were admissible in the former, but not in the latter, context. This was the correct understanding of the speech of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 W.L.R. 1381 and the analysis of the issue in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101. Leggatt LJ endorsed, at [50], the explanation of Mr David Halpern QC (sitting as a deputy High Court judge) in *Elmfield Road Ltd v Trillium (Prime) Property Group Ltd* [2016] EWHC 3122 (Ch) at [52]:

“The genesis and aim of a particular provision may be sufficiently important to qualify as part of the genesis and aim of the whole transaction. If so, it will be admissible pursuant to *Prenn v Simmonds*; if not, it is contrary to *Prenn v Simmonds* to allow it to be admitted.”

Observations of Sales J in *Investec Bank (Channel Islands) Ltd v The Retail Group plc* [2009] EWHC 476 (Ch) at [76], which suggested a contrary position, were to be read in the light of the subsequent decision in *Chartbrook*, which had reaffirmed the inadmissibility of pre-contractual negotiations when used to assist in understanding the genesis and object of a particular provision (as opposed to the entire transaction). See also *NHS Commissioning Board v Vasant (t/a MK Vasant & Associates)* [2019] EWCA Civ 1245, [2020] 1 All E.R.

(Comm) 799 at [28] and *Derhalli v Derhalli* [2019] EWHC 3286 (Ch) at [39]-[43] (appeal to the Court of Appeal outstanding).

### Rectification

In a comprehensive judgment, in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429, the Court of Appeal (Leggatt LJ, with whom Flaux and Rose LJJ “joined”), refused to follow the objective approach to “common intention” endorsed *obiter* by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] A.C. 1101 in the context of rectification for common mistake. Instead, the court set out why a subjective approach should be preferred.

To understand the approach to common mistake rectification post-*FSHC*, it is necessary to draw a distinction between the following two factual circumstances:

- (1) The parties have concluded negotiations and reached a binding contract in which they intend X. When the parties reduce that contract to writing, it actually amounts to Y. In this situation—the “antecedent contract” situation—rectification is sought in relation to the final written instrument in which the parties’ contract has been incorrectly recorded so as to make that instrument reflect the antecedent contract.
- (2) The parties have reached agreement and in their pre-contractual exchanges share an intention as to X. Their negotiations make clear that there is no binding contract until the agreement has been reduced to writing. When the parties reduce that (non-binding) agreement to writing, it actually amounts to Y. In this situation—the “no antecedent contract” situation—rectification is sought in relation to the final written instrument in which the parties’ agreement has been incorrectly recorded so as to make that instrument reflect the antecedent (non-binding) agreement.

As the court explained, it is accepted as a matter of authority that an objective approach is the correct one in the first category, in line with the usual approach to contractual interpretation. The main area of contention had arisen in relation to the second category. The judgment in *FSHC* sets out why, as a matter of authority (including other jurisdictions), principle, and policy, the subjective approach should be preferred in relation to the second category.

The court also explained (in the face of apparently conflicting authorities on the point) the need to for an “outward expression of accord” in establishing the relevant intention. That requirement had been established in *Joscelyne v Nissen* [1970] 2 Q.B. 86 and means uncommunicated intentions are not enough. Such an accord might not be difficult to establish, for it can be “tacit” (at [81]).

Leggatt LJ summarised, at [176]:

“[W]e are unable to accept that the objective test of rectification for common mistake articulated in Lord Hoffmann’s *obiter* remarks in the *Chartbrook* case correctly states the law. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document,

the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an “outward expression of accord”—meaning that, as a result of communication between them, the parties understood each other to share that intention.”

See further *MV Promotions Ltd v Telegraph Media Group Ltd* [2020] EWHC 1357 (Ch), where HHJ Hodge QC (sitting as a Judge of the High Court) (a leading author on rectification) described, at [35], the judgment of Leggatt LJ in *FSHC* as “scholarly and masterly”. See also *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch) at [195]-[216] (Trower J analysing *FSHC* and rectification in the context of the rectification of a deed and rules document relating to a pension scheme). Moreover, *FSHC* was recognised as setting out the correct approach to be taken to rectification for common mistake by Cockerill J in *PBS Energo AS v Bester Generacion UK Ltd* [2020] EWHC 223 (TCC), where the judge noted in passing, at [108], that “the earlier authorities speak with one voice in saying that the case for rectification must be made clearly, because what is being done is to contradict a written instrument which gives a strong *prima facie* indication of the parties’ intention. There is nothing in *FSHC* which suggests that this is no longer good law”.

### Exemption Clauses and Unfair Contract Terms

#### The *contra proferentem* rule

For a discussion of the *contra proferentem* rule in the context of exclusion clauses, see *The Federation of Nigeria v JP Morgan* [2019] EWHC 347 (Comm), [2019] 1 C.L.C. 207 at [34]-[35].

#### The *Canada Steamship* principles

For a discussion of the *Canada Steamship* principles (*Canada Steamship Lines v The King* [1952] A.C. 192), see *CNM Estates (Tolworth Tower) Ltd v VeCREFI SARL* [2020] EWHC 1605 (Comm) at [19]-[33].

#### Unfair Contract Terms Act 1977

For an analysis of section 3(2)(b) of the Unfair Contract Terms Act 1977 and also the reasonableness test under section 11 of the Act, see *Bates v Post Office Ltd (No.3)* [2019] EWHC 606 (QB) at [1064]-[1110].

## **Breach of Contract**

### **The classification of terms as conditions**

For an analysis of the distinction between the classification of terms as conditions and innominate terms, see the judgment of Gross LJ (McCombe and Leggatt LJJs agreeing) in *Ark Shipping Co llc v Silverburn Shipping (IoM) Ltd* [2019] EWCA Civ 1161, [2019] 2 Lloyd's Rep. 603.

## **Damages for Breach of Contract**

### **Expectation loss**

For a detailed analysis of *Allied Maples Group Ltd v Simmons and Simmons (a firm)* [1995] 1 W.L.R. 1602 and the principles relating to a claim for the loss of a chance, see *Assetco plc v Grant Thornton UK llp* [2019] EWHC 150 (Comm), [2019] Bus. L.R. 2291 from [361] (appeal outstanding).

### **Consequential loss**

For an analysis of the approach to be taken to the construction of an exclusion for “indirect or consequential loss” and the relevant case law concerning such exclusions, see *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC) at [218]-[241].

### **Taking account of known events at the date of the hearing**

In *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102, the parties had a contract for the carriage of iron ore from Brazil, where it was mined, to Malaysia. The contract contained an “exceptions clause” by which the charterer would not be liable for any failure to deliver a cargo to the shipowner “resulting from” any accident at the mine. Such an accident occurred, in the form of a dam burst. The charterer sought to rely on the exceptions clause to excuse its failure to deliver the iron ore, in circumstances where, in the absence of the dam burst, it would nevertheless have been unable to fulfil its supply obligations.

On the issue of liability, the Court of Appeal (Males LJ; Haddon-Cave and Rose LJJs agreeing) held that, in order to rely on the exceptions clause, the charterer had to prove that, but for the dam burst, it would have fulfilled its contractual obligations. It was unable to do this and so was liable. On the issue of damages and the correct application of the compensatory principle, the court held (reversing the “paradoxical” position of Teare J [2018] EWHC 2389 (Comm) on this point) that the charterer had an absolute obligation to supply the cargoes and once it was established that the exceptions clause did not prevent liability, the ship owner was entitled to substantial—and not merely nominal—damages. The court held that it was not correct to deny substantial damages on the basis that the exceptions clause would have operated as a defence even if the charterer would have otherwise been able to perform and contrasted the position on the facts from that in *Golden Strait Corporation v Nippon Yusen Kubishika*

*Kaisha, The Golden Victory* [2007] UKHL 12, [2007] 2 A.C. 353 and *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All E.R. 1082.

### Limitations on the ability to obtain compensation

For an application of so-called “SAAMCO principle” arising from *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191 (*SAAMCO*), see *Manchester Building Society v Grant Thornton llp* [2019] EWCA Civ 40, [2019] 1 W.L.R. 4610. In *Manchester Building Society* the defendant auditor had provided the claimant building society with incorrect information concerning the accounting treatment of long-term interest rate swaps. The building society suffered significant losses. The material question was whether the auditor had provided “information” or “advice” as defined in *SAAMCO* and subsequently. That question was relevant to the scope of the auditor’s liability for the building society’s losses and in particular whether the *SAAMCO* cap applied. The Court of Appeal held that although the auditor had provided advice, the case was, properly, one in the “information” category within the *SAAMCO* meaning. Hamblen LJ explained, at [63]-[64]:

“On the undisputed facts and the judge’s findings, it is apparent that this is not an “advice” case...GT [the auditor] gave accounting advice. It was not involved in the decision to enter into the swaps. MBS [the building society] did not leave it to GT “to consider what matters should be taken into account in deciding whether to enter into the transaction”, nor was [it] GT’s duty “to consider all relevant matters and not only specific matters in the decision”, nor was GT “responsible for guiding the whole decision-making process”.

It is correct that GT gave advice but, as explained by Lord Sumption JSC [in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] A.C. 599], what matters is not whether advice is given, but the purpose and effect of the advice given. In order to be an “advice” case, the advice needs to involve responsibility for “guiding the whole decision-making process”, which GT’s accounting advice manifestly did not.”

An appeal is due before the Supreme Court.

### Penalty clauses: determining whether the clause is penal

For an unsuccessful attempt to argue that a provision for default interest was unenforceable as a penalty, see *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) at [37]-[77].

For an analysis of the appropriate end date for liquidated damages payable for delay, see *Triple Point Technology Inc v PTT Public Co Ltd* [2019] EWCA Civ 230, [2019] 1 W.L.R. 3549 (an appeal is due before the Supreme Court). Emphasising the importance of considering the wording of the relevant provision, Sir Rupert Jackson (with whom Floyd and Lewison LJ agreed) held, at [110]: “There is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss”. See also the brief discussion of *Triple Point* in *PBS Energo AS v Bester Generacion UK Ltd* [2020] EWHC 223 (TCC) at [438]-[449].

## Remedies Providing for Specific Relief and Restitutionary Remedies

### Quantum meruit

*Macdonald Dickens & Mackin (a firm) v Costello* [2011] EWCA Civ 930, [2012] Q.B. 244 was considered by the Court of Appeal in *Barton v Gwyn-Jones* [2019] EWCA Civ 1999. By an agreement, Barton was entitled to an introduction fee of £1.2m if he found a purchaser for a certain property and the property was sold for £6.5m. Barton found a purchaser, but the fee paid for the property was only £6m. The question for the Court of Appeal was whether Barton was nevertheless entitled to be paid for the introduction and, if so, how much. Davis LJ explained, at [69], that the agreement was not: “you will *only* get remuneration if you introduce a purchaser at a price of £6.5m”; rather, it was: “you will be entitled to £1.2m if you introduce a purchaser at £6.5m”. In other words, the arrangement was not that Barton would be remunerated “if, and only if” the price was £6.5m (per Asplin LJ at [27]-[29]). Accordingly, *Costello* could be distinguished.

As the price was only £6m, Barton was not entitled to £1.2m, but was still entitled to some remuneration. This was calculated to be £435,000 as a reasonable value of the services provided by Barton on the basis of unjust enrichment.

### *Morris-Garner* and “negotiating damages”

For an application of the Supreme Court’s analysis of so-called “negotiating damages” in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] A.C. 649, see *Priyanka Shipping Ltd v Glory Bulk Carriers Pte Ltd* [2019] EWHC 2804 (Comm), [2019] 1 W.L.R. 6677. In *Priyanka*, the seller had sold a vessel to the buyer. The sale included a term by which the vessel was “sold for the purpose of demolition only” and which precluded the buyer’s trading the vessel further or selling it on for any purpose other than demolition. This was included because of the seller’s desire to reduce the oversupply in the market, which affected its revenues. The buyer traded the vessel in breach of this term. The seller claimed negotiating damages based on the price that it could reasonably have demanded from the buyer to release it from the contractual restriction, following *Morris-Garner*. In a judgment containing detailed analysis of Lord Reed JSC’s judgment in *Morris-Garner*, the judge (David Edwards QC, sitting as a deputy High Court judge) rejected this claim. It was explained that, as in *Morris-Garner*, the claim was not one for the loss of a valuable asset of the kind which it was recognised in *Morris-Garner* might give rise to negotiating damages. The judge held, at [193]:

“The present case is not one which is concerned with breach of a restrictive covenant over land or of a contractual right to control the use of land, or with breach of an intellectual property agreement or a confidentiality agreement. It is not, therefore, concerned with breaches of any of specific types of agreement or covenant that Lord Reed JSC mentioned.”

Moreover, while it was “plainly right that Lord Reed JSC only gave examples”, it was clear from his judgment that “what he had in mind were situations where there was some asset or property (or something analogous to it such as confidential information, arguably not property in the strict sense of the term) distinct from the contractual right itself” (at [195]).

## Privity of Contract and Third Party Rights

### Contracts (Rights of Third Parties) Act 1999: third party enforcement

See *Chudley v Clydesdale Bank plc (t/a Yorkshire Bank)* [2019] EWCA Civ 344, [2020] Q.B. 284 for a discussion and an application of sections 1(1)(b) and 1(3) of the Contracts (Rights of Third Parties) Act 1999.

### Transferred loss

For an unsuccessful attempt to rely on the principle of “transferred loss”, see *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc* [2019] EWCA Civ 596, [2019] 3 W.L.R. 1113 (upholding [2018] EWHC 1857 (Comm), [2019] 1 All E.R. (Comm) 543). The appellant and respondent supplied egg-based products in the Netherlands and the US respectively. The parties had agreed a contract which was conditional on the appellant’s procedures receiving regulatory approval. Approval was given but the parties renegotiated the contract to increase the price to take account of regulatory costs. After shipments began, the appellant was informed by the respondent that 50% of the product would be supplied by the appellant’s sister company (the third party). The respondent subsequently took the view that the appellant’s procedures were not compliant with regulatory requirements and suspended performance of the contract. The appellant claimed damages for breach of contract in respect of the profit it had expected to make under the contract and also the loss of profit in respect of the product supplied by the third party. The respondent contended that the renegotiated price had been procured by a fraudulent misrepresentation on the appellant’s part. The misrepresentation argument succeeded.<sup>1</sup> This meant the renegotiated contract was rescinded with the original one reinstated. From there arose the question whether the appellant could succeed in its claim for loss of profits in respect of its own losses and those of the third party. The claim was brought under the so-called “broader ground”.

Coulson LJ (with whom Longmore and Peter Jackson LJ agreed) held, at [73]:

“[F]or a successful claim for transferred loss that seeks to rely on the so-called broader ground, as explained in [*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85 and *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518], the claimant must show that, at the time that the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged.”

On the facts, the respondent was not aware of the existence of the third party and so the claim failed. Coulson LJ further explained, at [75], that if the requirement that the third party was known to the respondent were irrelevant, it would:

“mean that a main contractor would always be able to claim against the employer the losses suffered by his subcontractor, even if the employer had no knowledge of the subcontractor, or even that a subcontractor was going to be used at all. That would not

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<sup>1</sup> See further below under the discussion of misrepresentation.

only be contrary to the general rule, referred to by Lord Diplock in *The Albazero* [1977] A.C. 774 and Lord Sumption JSC and Lord Neuberger PSC in [*Swynson Ltd v Lowick Rose llp (formerly Hurst Morrison Thomson llp)*] [2017] UKSC 32, [2018] A.C. 313], that a party can only recover the losses that it has itself suffered, but it would also turn transferred loss, which is supposed to be a narrow exception to that rule, into a commonplace route of recovery.”

This conclusion made it unnecessary for Coulson LJ to decide two other matters on the appeal, namely whether the broader ground does not apply to sale of goods contracts and whether it mattered that the claim was one for loss of profit. To this he said, at [78]:

“In the light of my conclusion on this critical sub-issue, it is unnecessary, and possibly unwise, to express concluded views on the other sub-issues. I will confine myself to saying that, although I consider that, on the face of the authorities, the argument that the broader ground does not arise in sale of goods contracts has some force, it may be difficult to justify treating different types of contracts in a different way. Ultimately, it will depend on the analysis of the particular contract in question. Similarly, the fact that this was a claim for loss of profit, rather than the sort of claim addressed in the principal authorities (which were largely concerned with the cost of necessary remedial work) may also be a reason to and that the broader ground did not apply although, since a claim for loss of profit is a recognised head of loss in claims under or for breach of commercial contracts, it may again be difficult to exclude the principle of transferred loss merely because of the nature of the damages claimed.”

### **Frustration**

For an example of the narrowness of the doctrine of frustration, see *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch). That case, which considered whether a lease was frustrated as a result of Brexit (to which Marcus Smith J said no on the facts), is a significant case in the context of the possible consequences of Brexit in relation to existing contracts and the extent to which it might be possible to succeed in an argument that a contract has been frustrated by or in relation to Brexit. The judgment provides detailed analysis of the basis and scope of the doctrine of frustration, including the “multi-factorial” approach (following *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 All E.R. (Comm) 634).

### **Common Mistake**

#### **Express allocation of the risk**

For a discussion of common mistake, including the significance of an express allocation of risk, see *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm), [2019] 2 Lloyd’s Rep. 431 at [181]-[216].

### Categories of common mistake at common law

For an analysis of the approach to common mistake, see *Lehman Brothers International (Europe) (In Administration) v Exotix Partners llp* [2019] EWHC 2380 (Ch), [2020] 1 All E.R. (Comm) 635 at [179]-[203].

### Mistake of law

For an analysis of *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] Q.B. 303 and common mistake in relation to mistake of law, see *Elston v King* [2020] EWHC 55 (Ch).

## 14. Misrepresentation

### Inducement

*BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc* [2019] EWCA Civ 596, [2019] 3 W.L.R. 1113 (upholding [2018] EWHC 1857 (Comm), [2019] 1 All E.R. (Comm) 543) contains important analysis of the test of inducement for fraudulent misrepresentation. As was explained above (under transferred loss), one of the issues in that case was whether the respondent was entitled to rescind the contract following an allegation of fraudulent misrepresentation. The Court of Appeal held that the allegation was made out and the contract was rescinded. The judgment of Longmore LJ (with whom Peter Jackson and Coulson LJ agreed) sets out the correct approach to the issue of inducement. The following principles in relation to claims for fraudulent misrepresentation can be taken from Longmore LJ's analysis:

- (1) The burden is on the representee to prove it was induced to enter the contract (it is not for the representor to prove that the representee had not been so induced) (at [32] and [45]).
- (2) To prove inducement, the representee must prove that the misrepresentation had materially influenced its decision to make the contract, in the sense that it had been actively present in his mind (at [32] and [45]).
- (3) A representee is not required to show that it would not have entered the contract but for the misrepresentation, and the fact there were other reasons besides the misrepresentation for the representee to have entered the contract did not mean that it had not been induced by the misrepresentation made. Longmore LJ explained that a claimant must “show that his decision to make the relevant contract was “influenced” or “affected” by the representation” (at [34]).
- (4) There exists an evidential presumption of fact that a representee would have been induced by a fraudulent misrepresentation that was intended to cause it to enter the contract. Longmore LJ explained, at [25], that this “is a presumption of fact which can be rebutted, not a presumption of law which cannot be rebutted or can only be rebutted in a particular way”. Such a presumption is “very difficult to rebut” (the observation of Lord Clarke SCJ in *Hayward v Zurich Insurance Co plc* [2016] UKSC 48, [2017] A.C. 142 at [37]).

On the facts, the court upheld the judge's finding that the presumption had not been rebutted and so the defendant was entitled to rescind the second contract.

### **Fraudulent misrepresentation**

For a general analysis of the approach to fraudulent misrepresentation, see *Vald. Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) (discussed in *Glossop Cartons and Print Limited v Contact (Print and Packaging) Limited* [2019] EWHC 2314 (Ch)).

### **Duress, Undue Influence, and Unconscionable Bargains**

#### **Economic duress**

The decision in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch) has been reversed on appeal: [2019] EWCA Civ 828, [2020] Ch. 98. David Richards LJ (with whom Moylan and Asplin LJ agreed) held, at [105]: “[T]he doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes in good faith it is entitled, and that is so whether or not, objectively speaking, it has reasonable grounds for that belief.” In addition, his Lordship cautioned against the courts adopting an approach that turned on whether the accusation of economic duress was levelled against a party in a “monopoly position”, noting, at [107]: “[I]t would be unprincipled to develop the doctrine of economic duress as a means of controlling the lawful use of monopoly power” (a point endorsed by Asplin LJ, at [117]). See also the analysis of Kerr J in *Morley v The Royal Bank of Scotland plc* [2020] EWHC 88 (Ch) at [206]-[236]. At [236], Kerr J accepted, following *Times Travel*, “that ‘lawful act’ duress cannot exist in the absence of bad faith on the part of the person applying the pressure”, with “conduct which is morally or socially unacceptable” not enough. He further noted, at [237], that “[a]ggression and unpleasantness are not the same thing as bad faith”. Kerr J’s judgment also contains, at [238]-[268], analysis of unlawful act duress. The allegation of unlawful act duress was not made out on the facts. The threat in question “flirted with illegality but did not inexorably commit to it. To be unlawful, the act would have to be unlawful vis-à-vis the claimant and not just in the abstract” (at [267]) and, although “close to the borderline”, it “was not to do an act that was, unequivocally, unlawful”, but was (using the language of Dyson J in *DSND Subsea Ltd Petroleum Geo Services ASA* [2000] B.L.R. 530 at [131]) part of “the rough and tumble of the pressures of normal commercial bargaining”. *Times Travel* is due before the Supreme Court.

#### **Unconscionable Conduct**

The Unconscionable Conduct in Commerce Bill has reached the stage of the second reading in the House of Lords: <https://services.parliament.uk/Bills/2019-21/unconscionableconductincommerce/stages.html>.

### **Illegality and Restraint of Trade**

### Approach following *Patel v Mirza*

An application of *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 in the employment law context can be seen in *Okedina v Chikale* [2019] EWCA Civ 1393, [2019] I.C.R. 1635. In *Okedina*, an employer had continued to employ the claimant employee upon the expiry of the employee's visa, in breach of sections 15 and 21 of the Immigration, Asylum and Nationality Act 2006. The employer had misled the employee into believing the visa had been renewed. Upon her dismissal, the employee brought certain contractual claims relating to her employment. The employer denied liability on the basis of the illegality of the employment contract. The Court of Appeal found for the employee and held that the employee's claims were not barred by illegality. Neither section 15 nor section 21 had the effect that a person could not be a *party to a contract of employment* where the employee did not have the appropriate immigration status, and nor did they have the effect that such a contract should be unenforceable by either party. They simply provided for a penalty in the event of such employment, and imposed the penalty only on the employer.

For an unsuccessful attempt to rely on *Patel*, see *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2019] 3 W.L.R. 997 (upholding the Court of Appeal [2018] EWCA Civ 84, [2018] 1 W.L.R. 2777). See also *Bank St Petersburg PJSC V Arkhangelsky* [2020] EWCA Civ 408, [2020] 4 W.L.R. 55 at [87]-[92].

Further analysis of illegality and *Patel* is expected from the Supreme Court on appeal in *Stoffel & Co v Grondona* [2018] EWCA Civ 2031 (heard in May 2020).

### Contracts in restraint of trade

The judgment of Lord Wilson (with which the other four Justices agreed) in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2020] A.C. 154 contains significant analysis of the principles governing the enforceability of post-employment restraints of trade and the severance of unenforceable contractual provisions. Materially, an employee had been employed by a company. The employee's contract of employment contained a non-competition covenant, by which she could not, within six months of the end of her employment, "directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses" of the company. The employment came to an end. The employee informed the company that she intended to commence employment with one of its competitors, with such employment to commence prior to the expiry of the six-month period referred to in the non-competition covenant. The employee contended that such employment was not precluded by the non-competition covenant, because the covenant was void, being in unreasonable restraint of trade. To substantiate this, she focused on the part of the covenant that purported to prohibit her having an "interest" (or being "interested") in the competing businesses as specified in the covenant and used the example that such prohibition had the unreasonable effect of precluding her having even a minority shareholding in a competitor.

The company argued that the restraint of trade doctrine did not apply to a prohibition against such a holding. The court endorsed, at [30], the "broad, practical, rule of reason approach" to determining the applicability of the restraint of trade doctrine applied by the Court of Appeal in *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] 2 All E.R. (Comm) 815. It held that such a restraint on the employee's holding shares was within the

doctrine. That finding raised the question whether such a restriction was an *unreasonable* restraint of trade. The court held that it was. That raised the further question (considered below) whether the provision in question could be severed, with the remainder of the covenant preserved and enforceable.

For additional analysis of the principles applicable to the restraint of trade doctrine, see *CJ Motorsport Consulting Ltd v Bird* [2019] EWHC 2330 (QB), [2020] 1 All E.R. (Comm) 279.

### **Severing the offending parts/words**

Having established that the relevant provision on the facts was in unreasonable restraint of trade,<sup>2</sup> the Supreme Court in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2020] A.C. 154 held that the offending provision could nevertheless be severed from the contract. This meant the rest of the covenant would survive to prohibit the employee's entry into the proposed employment in the relevant period. The court disagreed with and overruled *Attwood v Lamont* [1920] 3 K.B. 571 and followed the general approach in *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] I.C.R. 1539.

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<sup>2</sup> See above under the discussion of contracts in restraint of trade.