

# Seminal judgements from the Supreme Court

Despite Covid disruption the Supreme Court still managed to hand down some key judgements during 2020 which **Hamish Lal** of **Akin Gump Strauss Hauer & Feld** focusses on as highlights of the year.

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## KEY POINTS

- Three judgments handed down by the Supreme Court in 2020 were seminal for construction.
- **Bresco** made clear that whilst the courts may not grant summary enforcement of the adjudicator's decision due to insolvency, that does not deprive adjudication of its potential usefulness to liquidators.
- **Halliburton** made clear that the duty of disclosure is not simply good arbitral practice but is a legal duty in English law.
- The question of remoteness of damage in contract law was restated by the Privy Council in a case involving the Attorney General of the Virgin Islands and a design and build water project contractor.
- Another case provided guidance on the duty of care owed to prevent third parties causing damage to property.
- In the above case the Court concluded that it is difficult to conceive of circumstances giving rise to an assumption of responsibility where there are no dealings between the parties.

## The Supreme Court

2020 saw the Supreme Court hand down three seminal Judgements for Construction Law. **Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2020] Bus LR 1140, [2020] UKSC 25** increased the reach of statutory adjudication and made clear that whilst the courts may not grant summary enforcement of the adjudicator's decision due to the insolvency process, that does not deprive adjudication of its potential usefulness

to liquidators. Subsequently, Fraser J in **John Doyle Construction Ltd v Erith Contractors Ltd (Rev 1) [2020] EWHC 2451 (TCC)** distilled and clarified at paragraph 53 "What Bresco has decided is that that these potential difficulties are to be considered upon enforcement; that there is real value to companies in liquidation to have adjudication available (as this may even resolve the underlying dispute with finality in many situations); and that companies in liquidation are to be permitted to adjudicate upon such disputes...".

**Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48** handed down on 27 November 2020 made clear that the duty of disclosure is not simply good arbitral practice but is a legal duty in English law. It is a component of the arbitrator's statutory obligations of fairness and impartiality but disclosure does not, however, override the arbitrator's duty of privacy and confidentiality. Where information which needs to be disclosed is subject to a duty of confidentiality, disclosure can only be made if the parties owed confidentiality obligations give their consent. Such consent may be express but may also be inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field of arbitration.

The arbitrator's duty of disclosure is to disclose matters which might reasonably give rise to justifiable doubts as to his or her impartiality but failure to disclose relevant matters is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias. **Halliburton** will impact adjudication where there is a duty on the adjudicator to act impartially which will import the legal duty of disclosure upon adjudicators. This is not an entirely new issue: in **Beumer Group UK Ltd v Vinci Construction UK Ltd [2016] EWHC**

2283 two adjudications were heard by the same adjudicator arising from the same underlying dispute, with one party appearing in both. That party advanced mutually inconsistent cases in the two adjudications. All of this was unknown to the other party. Fraser J held that the appointment of the common adjudicator without notifying the other party meant that this was a case of apparent bias.

***Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38*** has set the test on how one assesses the law of the arbitration agreement (which can be fundamental when for example there are contrary views on assignment). Put simply:

- ◆ where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract;
- ◆ in the absence of law to govern the contract, the arbitration agreement is governed by the law with which it is most closely connected and where the parties have chosen a seat of arbitration, this (will as a rule of law) generally be the law of the seat;
- ◆ the fact that the contract may include pre-arbitral steps will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it.

### Contract Law - Remoteness of Damage

The question of remoteness of damage in contract law was restated by the Privy Council in *Attorney General of the Virgin Islands v Global Water Associates Ltd (British Virgin Islands) [2020] UKPC 18*. In *Hadley v Baxendale* the Court held that the claim for loss of profits was too remote because the circumstances that the shaft was being transported to be a model for the manufacture of a new shaft and that the mill could not operate until the new shaft was delivered had not been communicated to the carriers. The Judge stated

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be

supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

However, Decision-Makers have always grappled with “contemplation”. Professor Andrew Burrows (now Lord Burrows) in “A Restatement of the English Law of Contract” stated “The general rule is that loss is too remote if that type of loss could not reasonably have been contemplated by the defendant as a serious possibility at the time the contract was made assuming that, at that time, the defendant had thought about the breach.” In *Attorney General of the Virgin Islands* Lord Hodge derived five propositions which, he stated, summarised the current position:

- ◆ First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.
- ◆ But the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility.
- ◆ What was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party who later commits the breach then possessed.
- ◆ The test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.
- ◆ The criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one.

### Tort – Duty of Care to prevent third parties causing damage to property

***Rushbond Plc v The JS Design Partnership LLP [2020] EWHC 1982 (TCC)*** concerned a claim arising out of a fire that occurred at a property owned by the Claimant. An architect employed by the Defendant carried out an inspection of the property on behalf of

a potential purchaser. The Claimant argued that the architect left the access door unlocked for a period of about one hour whilst inside the building and that one or more intruders were able to gain access through the unlocked door and, once inside the building, after the architect had left started the fire.

The Claimant said that the Defendant owed it a common law duty of care in tort in relation to the security of the Property during the architect's visit. Such duty arose from the architect making an unaccompanied visit to the property. Further or alternatively, a common law duty of care in tort arose from the architect having disabled the protections in place (including, in particular, the lock to the access door). The Defendant said it did not owe a duty of care to protect the Claimant from fire damage caused by the deliberate or careless actions of an unknown third party for whom the Defendant was not responsible; that it was not reasonably foreseeable that there would be property damage by fire caused by an intruder if the access door was not locked during the inspection; and although the Defendant has admitted that it was reasonably foreseeable that there was an increased risk of harm to the property by an unknown third party during the visit, mere foreseeability of harm is not sufficient to give rise to a duty of care in tort.

Having reviewed the seminal cases *Michael v Chief Constable of South Wales Police [2015] UKSC 2*, *Robinson v Chief Constable of West Yorkshire [2018] UKSC 4* where the courts have rejected the use of a 'universal test' to determine the circumstances in which a duty of care will be found to exist, the starting point for the court was to consider whether the circumstances of the case had been found to give rise to the existence of a duty of care in other cases.

In determining whether or not to extend a duty of care to novel situations, the court adopts an incremental basis by analogy with established categories of case where a duty has been found to exist. Further, there is a general rule that the

common law does not impose liability for negligence in relation to pure omissions, including loss arising through the criminal actions of a third party (the "Rule").

On the facts, the Court held that *Rushbond Plc* was a pure omissions case. This is because:

- ◆ The harm suffered was fire damage;
- ◆ That harm was not caused by the Defendant (but by a third party unconnected with the Defendant);
- ◆ The danger causing the damage was fire but the Defendant did not create the source of the fire or provide the means by which the fire started;
- ◆ By leaving the door unlocked, the Defendant increased the risk that an intruder might gain entry;
- ◆ Locking the door would have prevented the third party from causing the damage;
- ◆ Failing to lock the door amounted to a failure to prevent that harm;
- ◆ Failure to lock the door during the inspection may have been the occasion for the third party to gain access to the building but it did not provide the means by which the third party could start a fire and it was not causative of the fire.

Thus, the Court held that the facts did not give rise to an exception to the above Rule. In other words, it was not possible to impose an assumption of responsibility on the basis of which a duty of care might be owed.

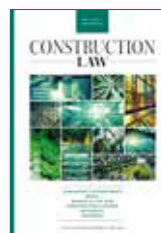
Relationships in which a duty to take positive action to safeguard the property of another have been found include contractual or quasi-contractual arrangements, promises and trusts, or circumstances where reliance is placed on a defendant's skill and expertise. In a commercial context, the Court concluded that it is difficult to conceive of circumstances giving rise to an assumption of responsibility where there are no dealings between the parties. **CL**



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