TECBAR Review
Spring 2019

The Newsletter of the Technology and Construction Bar Association

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## Message from the Chair

### Use it or lose it

TECBAR has always prided itself on the provision of continuing education and regards it, together with the opportunities it presents for getting members from various sets together, as one of its most important functions. TECBAR is continuing in that endeavour as well as seeking to improve accessibility to its events. For example, the annual lecture was delivered in late 2018 by Lord Hoffmann, who gave an excellent speech on rectification. That was videoed and is available on the website for those unable to attend. In a change from previous years in which the annual conference was held on a Saturday, this year we split it over two days (one morning session and one late afternoon/evening session). We are extremely grateful to those members who gave their time to delivering the excellent talks. Attendance at these events could have been better than it was. We do understand that personal and professional commitments may, on occasion, make attendance difficult and we are endeavouring to make events more accessible. It is so important that members attend from a CPD (it does still exist!) as well as a collegiate perspective. Attendance is crucial to the continuing viability of these events. To that end, any suggestions for the format and timing of future events are very welcome.

On other matters we have met with the Chair of the Bar and members of the Bar Council. With them, we hope to develop some international initiatives that will be of long-term benefit to the members.

Following the inaugural event last year, we had another QC panel evening jointly with COMBAR on 17 June. We hope that it was useful for those who are interested in applying for silk, or who just wanted to understand the process. TECBAR has also hosted an LGBT event in May and continues to work with the BAME Network on initiatives for careers in the law. To reflect the increasing importance of E&D in everything we do as an association, we propose to amend our rules at the forthcoming AGM to include a new object specifically to promote equality and diversity amongst the membership.

Associated with that, I am pleased to say that, by some considerable margin, we have the highest proportion of female adjudicators of any of the ANBs. Our programme of refreshing the adjudicator panels is now underway. The first qualifying session was widely regarded as a success by those attending and the second, remaining, qualifying session takes place in November. This provides an excellent opportunity for more women to qualify.

Junior TECBAR has an event scheduled for 5 July at which Waksman J has agreed to give "A view from the Bench: Question Time with the Judge". Please do come.

I close on the saddest of notes. As many will know, Jane Lemon QC died in April of this year. She was known to most TECBAR practitioners and will be a great loss to the construction bar. The memorial service in Temple Church was packed with those wanting to pay their respects to a friend and colleague. Along with representatives from TECSA and the judiciary, we have been discussing a suitable way in which her contribution

### List of Contents

to the law can be remembered and I will let you know more about that in due course.

***Alexander Nissen QC***
*Keating Chambers*

## From the Editor

This Spring issue of *TECBAR Review* contains two contributions.

In the first, Karen Gough of 39 Essex Chambers has provided an extract from her *Arbitration Update*, as delivered at the second of this year's TECBAR Conferences, on 4 April 2019. Karen discusses recent developments in the law of apparent bias, and the difficulties which the guidance in the authorities presents to the practitioner.

Second, John Marrin QC of Keating Chambers has provided a TECBAR perspective on improving racial inclusion at the Bar, and – in particular – whether Jay-Z's experience of arbitration in New York may have something to teach us about diversity in the profession closer to home.

Our next issue, at the end of August 2019, will contain two Messages from the Chair: a farewell address from Alexander Nissen QC and a welcome address from our incoming Chair. Looking past the summer – after what will hopefully have been holidays for much of the readership – I would take this opportunity to encourage all Members, and in particular junior Members, to consider contributing to the *Review*. Our readership is wide and committed, and I would always be keen to discuss topics with potential contributors.

***Christopher Reid***
*Atkin Chambers*

## Arbitration Update – Recent Cases

This is an extract from the talk given at the TECBAR Conference on 4 April 2019 reviewing recent developments in arbitration law.

The tension between the disclosure obligations of members of arbitral and judicial tribunals and issues of apparent bias continues to take up time in the courts, with inconsistent and controversial results. Given the basic and wholly uncontroversial test for apparent bias, laid down by the [then] House of Lords in the case of *Porter v McGill* [2001] UKHL 67; [2002] 2 AC 357, should we be surprised? The test: *"[a] fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

The first case is a decision of the Privy Council and therefore, insofar as it provides any settled principles for tribunal members to follow, the most significant of the cases under review. The case of *Almazeedi v Penner and Another (Cayman Islands)* [2018] UKPC 3 concerned a challenge to the independence of a judge sitting in the Financial Services Division of the Grand Court of the Cayman Islands.

The judge in question was Cresswell J, a former judge of the Commercial Court of England and Wales between 1991 and 2007. In 2009, following his retirement from the English High Court Bench, he became an additional judge of the Financial Services Division of the Grand Court, sitting ad hoc. The Division of the Grand Court consisted of the Chief Justice and two other full-time judges, together with three additional judges sitting part-time, one of whom was Cresswell J. In addition, from late 2011, Cresswell J also became a supplementary judge of the Civil and Commercial Court, at the Qatar Financial Centre. He was sworn in as a judge there on 8 May 2012 but, in fact, he did not appear ever to have sat there in that capacity, or to have received any remuneration as a result of his appointment in Qatar.

The dispute in *Almazeedi* was between BTU Power Company ("BTU"), of which Mr Almazeedi was a director, and its predominantly Qatari shareholders, who had strong state connections. BTU's preference shareholders, which included the Qatar Investment Authority ("QIA") and the Qatar National Bank ("QNB"), held the effective economic interest in the company. QIA is state owned and owns 50% of QNB. The CEO of QNB from about 2006 was a Mr Al Emadi. On 26 June 2013 Mr Al Emadi became the chairman of QNB and the Minister of Finance for Qatar. In both the chairmanship of QNB and as Minister of Finance he succeeded his father-in-law, a Mr Kamal. The office of the Minister of Finance for Qatar held direct responsibility for judicial appointments in the Qatar Civil and Commercial Courts. BTU was managed by BTU Power Management Company ("BTU PMC") of which Mr Almazeedi was the controlling shareholder. From 2007 he was also the sole director of BTU.

Disputes arose between Mr Almazeedi and the preference shareholders who, on 11 November 2011 presented a preference shareholder's petition to wind up BTU on just and equitable grounds. Between November 2011 and September 2014, Cresswell J was the judge assigned with the conduct of a winding-up petition and associated applications, and thereafter with the liquidation of BTU. Before the winding-up petition was heard and determined, the judge was therefore aware of various aspects in dispute between the parties, and that the dispute was seen by a legal

adviser for one of the preference shareholders as being with the state of Qatar.

The winding-up petition was eventually heard by Cresswell J. Ultimately, BTU did not resist the making of the winding-up order because all the company's preference shareholders had supported the petition. Accordingly, the judge ordered the appointment of liquidators in January 2012. Mr Almazeedi, BTU PMS, and others, lodged proofs of debt amounting to more than US$41 million. When the hearing came on, only Mr Almazeedi's proof of debt for $672,000 remained. This was dismissed and Mr Almazeedi was also ordered to pay costs in connection with the application. The judge continued to preside over the liquidation until his retirement from the bench in late 2014. He made his last order in the case on 10 September 2014.

However, on 19 June 2014, Mr Almazeedi had written a letter to the judge to explain that he could not afford to continue to defend the liquidators' claim against him, or pursue his own claims. In arranging for its delivery, he had discovered the judge's concurrent appointment as a judge of the Qatar Civil and Commercial Court. After taking legal advice, he applied on 5 November 2014 to the Grand Court to set aside the order of 10 September 2014, and to the Court of Appeal by way of appeal against all the orders made in the case by the judge.

There being, as is usually the case, no suggestion whatsoever that the tribunal was tainted by actual bias, the basis of the challenge was that at the time he was determining the case before him, the judge ought to have disclosed his links with the state of Qatar and that his failure to do so gave rise to the appearance of bias. The Court of Appeal decided that the critical date for the purposes of the challenge was 26 June 2013, when Mr Al Emadi became the Minister of Finance. It upheld the challenge after that date but dismissed it before. Mr Almazeedi appealed to the Privy Council on the basis that the whole of the proceedings was tainted. The joint liquidators cross appealed, claiming the Court of Appeal was wrong to find that the judge lacked independence from 26 June 2013.

The leading Judgment of the court was given by Lord Mance, with Lord Sumption dissenting. The Privy Council majority, "*with some reluctance*" decided that the judge should have disclosed his involvement with the state of Qatar in determining the winding-up petition and that, in the absence of any such disclosure, a fair-minded and informed observer would see a real risk of bias.

The majority judgment focused on the principle emphasised in *Millar v Dickinson* [2002] 1 WLR 1615 and the right of a litigant to an independent and impartial tribunal which is *"fundamental to his right to a fair trial"* (see paragraphs 1, 26 and 27 of the judgment). There was discussion of the notion (which was dismissed) that a distinguished and retired judge would break his judicial oath and jeopardise his reputation to curry favour with the state. A comparison was made with the case of *Prince Jefri Bolkiah v State of Brunei Darussalam (No 3)* [2007] UKPC 62 where the Chief Justice, also a retired judge from a different jurisdiction, was challenged on the basis of his links to the Sultan of Brunei.

In the *Prince Jefri* case, the court cited with approval the requirement for a judge to be fair and neutral as set out in *Locabail (UK) Ltd v Bayfield Properties* Ltd [2000] QB 451, (at paragraph 2). There, it was held that a judge will be disqualified from adjudicating on a case if he has a personal interest in the outcome or if it is shown that his capacity for objective judgment is liable to be swayed by partiality or antagonism towards any of the parties, ie actual bias. In considering the position of the Chief Justice of Brunei (a former, and retired judge from Hong Kong) in the *Prince Jefri* case, the Privy Council had this to say:

> *"21. ...The fair-minded and informed observer must be taken to understand that the Chief Justice was a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, sworn to do right to all manner of people without fear or favour, affection or ill-will and already enjoying what he described as 'reasonably adequate' pension provision. Such an observer would dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension of his contract, or to avoid a reduction of his salary which has never (so far as the Board is aware) been made in the case of any Brunei judge at any time. The Chief Justice must be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation."* (See paragraphs 18 and 19 of *Almazeedi*.)

The Privy Council also considered the characteristics of the fair-minded and informed observer:

> *"She or he is a person who reserves judgment until both sides of any argument are apparent, who is not unduly sensitive or suspicious, and who is not to be confused with the person raising the complaint of apparent bias…*
>
> *She or he is not, on the other hand complacent, knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weaknesses – an observation with perhaps particular relevance in relation to unconscious predisposition. She or he 'will not shrink from the conclusion, if it can be justified objectively, that things*

*that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially' ... " (See Helow v SoS for the Home Department* [2008] UKHL 62, at paragraphs 2 and 3.)

In *Millar v Dickson* the Privy Council had also held that:

> "*63. The question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case …"*

On the facts of the *Almazeedi* case, the Privy Council opined that at no stage during Cresswell J's engagement with the case was there any scope for argument that any lack of independence due to apparent bias did not matter. It highlighted the observation by the Caymans Court of Appeal that:

> *"it must be entirely exceptional, if not unique, for a senior government minister, with power over the appointment and removal of judges, to be involved personally in litigation being conducted overseas by a judge who is also a judge of a court, however distinguished, in the country where that minister exercises power."*

The Privy Council took the view that the public roles of the personalities involved on behalf of the preference shareholders were public knowledge and therefore would be known to the fair-minded and informed observer. Applying this knowledge to such a person on the Cayman Islands legal scene, it decided it was inappropriate for the judge to sit without disclosure of his position in Qatar, not only in relation to the hearing of the case from 26 June 2013, but also before, from at least 25 January 2012 (the day before the making of the winding-up petition, when the judge became aware of aspects of the dispute between Mr Almazeedi and QIA, QNB and Mr Al Emadi).

Lord Sumption, however, issued a strong dissenting opinion in which he explained that the dispute was not about the legal test for apparent bias, but its application to the facts. He noted: *"… the notional fair-minded and informed observer whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care … The many decisions in this field are generally characterised by robust common-sense."* (At paragraph 36.) The subtext being that those considering the issues in this case, at all levels, had lost sight of that imperative.

Lord Sumption summarised the position of the judges sitting on the Qatar International Court and Dispute Resolution Centre, which had, at that time, nine full time and four supplementary judges, all but one of whom were non-Qataris and judges of distinction from a number of jurisdictions. He found it *"hardly conceivable"* that the other judges would lend their reputations to an institution about which credible allegations of government interference in their work had been made. He also challenged the actual knowledge of Cresswell J of the facts which were imputed to him by the majority. There was, he said, no allegation of anything done by the judge which could raise doubts about his independence; the case resting on the hypothetical possibility of action against him in Qatar arising from any decision in Cayman Islands against the interests of the government.

As Lord Sumption pointed out: because there are few limits to the possibilities that can be hypothetically envisaged, there must be some substance to them. He took the view that the suggestion that the judge might be influenced by the thought that his appointment in Qatar might not be renewed if he made a decision adverse to the state's interests to lie *"at the outer extreme of implausibility"*. While he accepted that Mr Almazeedi might take the possibility seriously, he considered that the notional and fair-minded and informed observers would *"not regard it as amounting even to a serious working hypothesis"*. He went on to describe Mr Almazeedi's case as *"fantastic"* in respect of the periods both before and after 26 June 2013.

So, as practitioners, we are left in no doubt as to the legal tests for apparent bias; there is nothing new in the judgment so far as that is concerned. At one and the same time, however, we are left in something of a quandary as to how to predict the attitude of the courts when it comes to *applying* the test to the facts of any particular case.

This problem is again before us now in the case of *Halliburton v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, [2018] Lloyd's Rep IR 402, which concerns multiple appointments as arbitrator in circumstances in which there was a failure by the arbitrator to disclose certain other appointments – which were found to be relevant and *prima facie* disclosable – but where the courts, thus far, have not found apparent bias.

The leading judgment of the Court of Appeal was by Hamblen LJ (the same judge as in *Cofely v Bingham* [2016] EWHC 240 (Comm), [2016] BLR 187 in the Commercial Court) which is cited here as a case of an *"inappropriate response"* to the suggestion that there should be or should have been disclosure (see paragraph 75).

This case was a Bermuda Form arbitration where the arbitrator had accepted appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party, without giving disclosure. The dispute arose from the explosion and fire on the Deepwater Horizon oil rig in 2010, after which

numerous claims were made against Halliburton, BP and Transocean. Halliburton settled the claims against it and sought to recoup the cost from Chubb, its liability insurer. Chubb refused to pay Halliburton's claim and the dispute was then referred to arbitration.

The parties were unable to reach any agreement on a suitable person to be appointed as arbitrator, and the eventual arbitrator, M, was appointed as chairman on the application of the parties to the English Commercial Court.

Prior to his appointment by the court, M had disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party and that he was currently appointed as an arbitrator in two pending references in which Chubb was involved. However, and after his appointment in this dispute, M accepted appointments in relation to separate claims arising out of the same incident made by Transocean against Chubb and a different insurer. These appointments were not disclosed. Halliburton later learned about them and applied to the Commercial Court to remove M as arbitrator. The application was dismissed by the Commercial Court (Popplewell J). Halliburton appealed.

The Court of Appeal (comprising Vos C and Simon and Hamblen LJJ) accepted as a matter of principle that inside information and knowledge may be a legitimate concern for a party in overlapping arbitrations involving a common arbitrator, but only one common party. The court held however that that in itself did not justify an inference of apparent bias.

The Court of Appeal commented that arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind (reiterating the principles discussed in *Almazeedi*). It held that the mere fact of appointment in overlapping arbitrations does not give rise to justifiable doubts as to the arbitrator's impartiality. The court emphasised that disclosure should be given of facts and circumstances known to the arbitrator which would, or might, give rise to justifiable doubts as to his impartiality, and it concluded that in this case disclosure ought to have been given by the arbitrator. It went on to hold, however, that in this case the non-disclosure would not have led a fair-minded and informed observer to conclude that there was a real possibility of bias.

The question, therefore, is whether this an example of the "*robust common-sense*" approach advocated by Lord Sumption, or a watering down of the application of the legal test, predicated as it is on a strong presumption of independence and impartiality of a tribunal?

It is of course not the first case to decide that although a disclosure ought to have been made, the fair-minded and informed observer would not conclude, absent disclosure, that there was apparent bias and the tribunal need not recuse itself. Knowles J so found in the case of *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm), [2016] 1 Lloyd's Rep 552, a case based on a challenge alleging apparent bias based on the ground of alleged conflict of interest which fell squarely within paragraph 1.4 of the Non-Waivable Red List within the 2014 IBA Guidelines, ie, that: "*The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom*."

Whilst it was clear that the arbitrator's law firm did have a connection with the defendant through a subsidiary, for which it received instructions and remuneration, the evidence was that the arbitrator was unaware of the connections and he stated that had he known, he would have made the disclosure. In that case, despite the apparent breach of the IBA "Red" List (which, while of assistance, did not bind the court (paragraph 26)), the court had no hesitation in dismissing the challenge. It stated:

> *"24. The fact that the arbitrator would have made a disclosure if he had been alerted to the situation shows a commitment to transparency that would be relevant in the mind of the fair-minded and informed observer. It also shows that the arbitrator could not have been biased by reason of the firm's work for the client. That work was not in his mind at all; had it been he would have disclosed it."*

Accordingly, and coming back to *Halliburton v Chubb*, while confirming the position in relation to an arbitrator's duty to disclose any fact or circumstance material to consideration of his/her suitability for appointment as arbitrator, the case demonstrates that, although non-disclosure is a factor to be taken into account when considering apparent bias, it will not, of itself, justify the inference in every case.

Unsurprisingly perhaps, this case is now the subject of further appeal. It is to be heard by the Supreme Court in 2019. Such is the professional concern surrounding this issue that the LCIA, CIArb and ICC intervened in the application for permission to appeal and it is supposed, but not known, that they will seek to participate in the appeal.

Stephenson Harwood acted for the CIArb on the permission application, and had this to say about the Court of Appeal's dismissal of the appeal (upholding the Commercial Court's ruling (by Popplewell J) that notwithstanding the failure to disclose the other appointments, the arbitrator was not guilty of apparent bias):

> *"The arbitration community has reacted with some concern to the Court of Appeal's decision, particularly in light of the court's apparent significant reliance*

*upon the arbitrator's reputation, eminence and experience. Arbitrators and institutions appear to have been left wondering how, in light of the ruling, they can reliably predict whether a particular arbitrator in a particular case will be required to step down. The decision is also felt to have provided little clarity on the difficult question of multiple appointments in overlapping cases with a common party."*

This all begs the question as to whether such concern is really justified, or whether the institutions, including the IBA, are seeking to impose too rigid disclosure obligations which, whether by accident or design, are likely to cause more problems than they prevent. Historically, the courts have been keen to make it clear that arbitrators should not be pressured into providing unnecessary disclosure, or lightly resign under pressure from one party in the face of a conflicts challenge. A tribunal cannot disclose facts of which it is unaware and, equally, the case of *A v B* is authority for the proposition that a tribunal ought not to disclose matters about which it knows, but which it does not consider to give rise to an issue of conflict: *A v B* [2011] EWHC 2345 (Comm), [2011] 2 Lloyd's Rep 591 (at paragraph 29) referring to paragraph 64 in the Court of Appeal's Judgment in the case of *Taylor v Lawrence* [2003] QB 528.

The test for apparent bias is clear and the principles upon which it is based are equally clear. What is in issue is the application of the test to the facts of a particular case. *Almazeedi* demonstrates that even five judges in the Privy Council can disagree on the conclusions to be derived from the same set of facts.

As practitioners, and in the face of an uncertainty that is unlikely to be resolved by the Supreme Court's view of another particular set of facts, the advice is to err on the side of caution and disclose anything with any semblance of relevance to the appointment, at every stage. Quite clearly, neither judges, nor arbitrators, are safe to rely on common sense, nor on any notion of imputed integrity or professionalism associated with their appointment as arbitrator, or even – it would seem – as a judge.

***Karen Gough***
*39 Essex Chambers*

## Improving Racial Inclusion at the Bar: A TECBAR Perspective

In 2018 the rapper, Jay-Z, had a brush with the arbitration community in New York. It turned out that the roster of arbitrators maintained by the American Arbitration Association ("the AAA"), from which Jay-Z was required to choose an arbitrator, included not a single African-American arbitrator. Jay-Z's lawyers secured an injunction which temporarily restrained further proceedings in the arbitration on the footing that the AAA's procedures arguably deprived him of equal protection under the law and equal access to justice.

The case serves to remind us of a diversity problem closer to home. As pointed out in the BSB's February 2018 Report on Race Equality, the statistics show that "*Put very simply, if you've got an Oxbridge first and you are white you are much more likely to get a pupillage than if you have the same qualifications and are BAME. We need to understand much better the detail of that in order to understand why that might be the case and to work out what action we should be taking*". In discussing the reasons for this, the report points to the fact that Black, Asian and Minority Ethnic ("BAME") students are less likely to have knowledge of the Bar and its workings; and they are less likely to be able to tap into networks at the Bar.

The commercial bar and, specifically, TECBAR members are making determined strides to be fairer and more inclusive. As Coulson LJ has said, it is a matter of some pride that the TCC is now the first division of the High Court to have achieved gender parity on the bench and we are just now starting to see the first wave of BAME practitioners at the TCC taking silk, with other BAME barristers rising through the ranks. But there has never been a BAME judge at the TCC; and it is only recently for the first time that a BAME judge has been appointed to the Court of Appeal. By comparison with the advance in gender diversity, progress in addressing racial diversity on the bench has been disappointing.

The position is better in commercial arbitration, but not much. Had Jay-Z's proceedings been London-based, the procedure would probably have been different. But he might well have been similarly dismayed at the lack of diversity amongst the available arbitrators. In the event, it seems that Jay-Z achieved some speedy redress to his grievances. For the reference in question, the AAA appears to have agreed to put aside its roster. It seems eventually to have put forward some 18 African-American arbitrators for consideration. And it seems to have agreed to take various steps to improve the diversity of its roster for use in future arbitrations.

To hope for such rapid results in meeting our problems at TECBAR seems optimistic. Because we need to address the problem as essentially one of recruitment, we must settle in for a long campaign. To that end, I welcome the formation of TECBAR's BAME Network. As

Continued on p8

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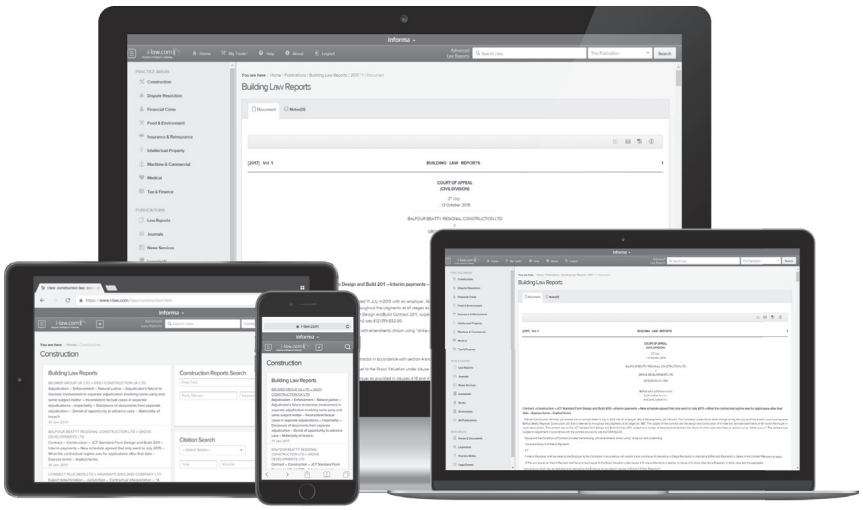

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Continued from page 6

an organisation, the BAME Network recognises that race is one factor amongst many that need addressing. It emphasises the need to regard social mobility, gender equality, disability access and LGBT equality as being linked to the progress of BAME individuals. The BAME Network promotes greater engagement with those students who traditionally may not be aware of the Bar. It encourages individual Chambers to explore an enlightened approach to recruitment and selection. And it calls upon the profession to address the problem of BPTC fees as a barrier to entry. I encourage all members of TECBAR to support and work with the BAME Network in these endeavours.

*John Marrin QC*
*Keating Chambers*

## S&T (UK) LTD v GROVE DEVELOPMENTS LTD UKSC 2018/0222

## Supreme Court Permission to Appeal, Lord Wilson, Lord Lloyd-Jones and Lord Sales, 22 May 2019

Validity of pay less notice – If notice deficient whether party issuing notice entitled to commence a separate adjudication seeking a decision as to the "true" value of the interim application

The Supreme Court has given the contractor leave to appeal against the decision of the Court of Appeal ([2018] EWCA Civ 2448, [2019] BLR 1). The Court of Appeal held that a pay less notice issued by the claimant employer was not deficient despite the fact that information was contained in a document previously sent to the defendant contractor. In each case it is a question of fact and degree whether the purported pay less notice achieved the requisite degree of specificity. More importantly, the Court of Appeal held, on the assumption that the pay less notice was deficient, that the claimant employer was entitled to commence a separate adjudication seeking a decision as to the true value of the interim application for payment which had been the subject of the earlier adjudication provided that it had first paid the notified sum to the contractor. Finally, the Court of Appeal held that the notices served by the claimant employer were sufficient to entitle it to deduct or recover liquidated damages for delay.

The defendant contractor has been given permission by the Supreme Court to appeal against the decision of the Court of Appeal. It is the second ground of appeal that is likely to be of considerable significance for the construction industry and the decision will be awaited with keen interest. It will also be important to keep in mind that the decision is now subject to appeal when considering how to deal with the entitlement of a party to commence a separate adjudication after that party has served a non-compliant pay less notice.

*Originally published in the Construction Law Reporter service, available to subscribers of Construction on i-law.com. For more information contact kate.clifton@informa.com.*

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ISSN 1472 0078

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