39 Essex CHAMBERS

OUTLOOK

NEWS AND VIEWS FROM THE
39 ESSEX COMMERCIAL AND CONSTRUCTION GROUP
June 2020

INTRODUCTION

David Hopkins

Welcome to the June 2020 edition of Outlook, a roundup of news and views from the 39 Essex Commercial and Construction Group.

On 17 June, the Supreme Court handed down its much anticipated judgment in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd,* which partly reversed the judgment given in the same matter by the Court of Appeal. The Supreme Court held that adjudication remains available to a party which has entered insolvent liquidation. **Marion Smith QC, David Sawtell** and **Philippe Kuhn** provide an overview of the case and some initial reflections, while **Shaman Kapoor** considers some commercial concerns from a costs perspective.

Niraj Modha looks at a recent decision of the Court of Appeal regarding section 44(2) of the Arbitration Act 1996. In the lexicographically named *A & B v C & D & E*, the Court of Appeal confirmed that, pursuant to s 44(2), the court has a discretion to compel a non-party to a foreign arbitration to give evidence. This power may prove particularly useful in the event that witnesses are unwilling or unable to travel during current circumstances.

Contents

In the latest of a series of articles, **Rose Grogan** and **Philippe Kuhn** give an update on the UK government's procurement guidance issued during the pandemic. Their article analyses the main fraud risks faced by public authorities, the available fraud prevention measures and contractual mechanisms to recover money.

And last month, Chambers launched a brand new series called "At Home, around the World". In these short videos, a number of different members of Chambers based all over the world came together with a host of different expert jurists, practitioners and commentators for a series of informal conversations. **James Bradford** rounds up the series so far.

Podcasts

For those looking for a break from their screens, we are also delighted to present a number of podcasts recorded over the last few weeks by members of the Commercial and Construction Group on topics of interest:

- When a party refers a delay claim to adjudication, it will often want to support its case with a newly prepared delay report. Does this, however, raise a fresh dispute, requiring a fresh notification and hence more time for the responding party to consider it before a dispute crystallises? **David Sawtell** considers a recent decision of O'Farrell J. Click here to listen.
- What are the principles which apply when the Court is both determining the applicable law of an arbitration agreement and considering whether to exercise the discretion to grant an anti-suit injunction? **Niraj Modha** examines judgments handed down this year by the Court of Appeal *(Enka v Chubb)* and the High Court *(Times Trading Corpn v National Bank of Fujairah).* Click here to listen.
- What is the procedure to adopt when challenging the admissibility of expert evidence on the grounds that the evidence is not independent? **David Sawtell** looks at the High Court's decision in *Blackpool Borough Council v Volkerfitzpatrick Ltd.* Click here to listen.

Quarantine Queries

The Commercial and Construction team continues to offer our new initiative which we hope will help those of you who are working in isolation. We have established a team of silks and juniors who will be available for up to half an hour – free of charge – to talk through the kind of issues that you would previously have mulled over with a colleague at the coffee machine. The discussion will be on a "no liability" and "no names" basis; however, you will be asked to provide some brief details of the query to our clerks so that they can make a barrister available.

If there is a matter that you would like to discuss (COVID-19 related or otherwise) please contact:

Niki Merison
niki.merison@39essex.com
+44 (0)7872 178 645

or

Mark Winrow
mark.winrow@39essex.com
+44 (0)7930 333 993

and book a slot with one of our barristers.
.

BRESCO v LONSDALE IN THE SUPREME COURT: INITIAL REFLECTIONS

Marion Smith QC
David Sawtell
Philippe Kuhn

The resolution of disputes by means of adjudication is a central feature of the construction industry. It has generated a substantial body of case law. However, issues of construction adjudication rarely go to the Supreme Court. On 17 June, the Supreme Court handed down its much-anticipated judgment in ***Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd.***[1] This deals with the inter-relationship between insolvency and adjudication, which is critical to the construction industry as it faces post-Covid-19 lockdown reality. Heard by a panel of commercial and chancery judges (Lords Reed, Briggs, Kitchin, Hamblen and Leggatt), the Supreme Court disagreed in part with the approach adopted by specialist construction judges in both the TCC and the Court of Appeal. The effect of the Supreme Court decision will be to allow more companies in liquidation to adjudicate.

Bresco concerns the relationship between the construction adjudication and payment regime under Part II of the Housing Grants, Construction and Regeneration Act 1996 (**"the Construction Act"**) and the rules on insolvency set-off in liquidation now contained in rule 14.25 of the Insolvency (England and Wales) Rules 2016 (**"IR 2016"**), where a cross-claim is made either in an adjudication or where the parties have other claims that they could set up against each other. Two key issues arose for resolution in the Supreme Court:

1) **Jurisdiction:** Whether the effect of insolvency set-off is such that there is only a single claim for the net balance, so that there is no longer a claim and therefore a dispute under the construction contract.
2) **Futility:** Whether the conduct of an adjudication in the context of insolvency set-off will in general not lead to an enforceable decision and, therefore, lead to a waste of costs and lack a useful purpose.

In a single judgment given by Lord Briggs, the Supreme Court decided that there was jurisdiction and no futility in such an adjudication. It reversed the Court of Appeal's decision on the futility point and Fraser J's decision at first instance on both points.[2]

1) Facts and procedural history:

As to the underlying dispute, in 2014, Bresco had carried out installation work for Lonsdale on a construction site at St James's Square in London. This was carried out under a construction contract which expressly incorporated paragraph 1(1) of the Scheme for Construction Contracts ("the Scheme") which provides that any party may give written notice of his intention to refer *"any dispute arising under the contract to adjudication"*. In 2015, Bresco became insolvent and entered into voluntary liquidation. Lonsdale's position was that Bresco had abandoned the project prematurely, resulting in the need to spend £325,000 on replacement contractors. By contrast, Bresco alleged it was owed £219,000 in respect of unpaid fees plus damages for lost profits. In 2018, Bresco referred the latter claim to an adjudicator. Lonsdale objected on the basis that any such claim was cancelled out by Lonsdale's cross-claim by operation of insolvency set-off.

1 [2020] UKSC 25. The most notable recent example is ***Aspect Contracts (Asbestos) Ltd v Higgins Construction plc*** [2015] UKSC 38; [2015] 1 WLR 2961. Another relevant decision about the interface between the payment mechanism in the Construction Act was ***Melville Dundas Ltd (In Receivership) v George Wimpey UK Ltd*** [2007] UKHL 18; [2007] 1 WLR 1136, where Lord Hoffmann made a number of comments about the law of insolvency set off insofar as it related to interim payments.

2 The Court of Appeal's decision is reported at [2019] EWCA Civ 27; [2019] BCC 490. Fraser J's decision is reported at [2018] EWHC 2043 (TCC).

Fraser J in the TCC granted an injunction halting the adjudication (accepting both Lonsdale's jurisdiction and futility arguments). On appeal, the Court of Appeal (Coulson LJ, with whom Sir Andrew McFarlane P and King LJ agreed) continued the injunction restraining the further conduct of the adjudication on the futility ground only. Bresco appealed against the continuation of the injunction, while Lonsdale cross-appealed on the jurisdiction issue. Having heard this case remotely over 2 days on 22 and 23 April, the Supreme Court delivered a unanimous and speedy judgment.

2) Nature of construction adjudication and insolvency regimes:

Two observations are important to the Supreme Court's approach and are relevant to both the jurisdiction and futility issues in this appeal.

First, Lord Briggs provided an account of the process of adjudication and its parallels and differences with arbitration and the insolvency set-off process. He provided a list of key features of construction adjudication.[3] It was described as (1) semi-compulsory; (2) not subject to exclusions of particular types of persons; (3) wide in jurisdictional terms (focussing on whether any dispute arises under a qualifying contract); (4) speedy given strict time limits; (5) often cheaper than litigation and arbitration; (6) reliant on independent and often expert adjudicators; and (7) as a corollary, less reliable than litigation and arbitration, but subject to de novo determination. Lord Briggs considered that *"[t]he process of proof of debt in the insolvency regime shares a number of the essential features of adjudication",* in terms of speed, cost and professional experience on the part of the liquidator, and stressed that the proof process is *"relatively light-touch and inquisitorial, and the outcome is only provisionally binding"*.[4]

Second, another significant proposition which permeates Lord Brigg's entire judgment is that adjudication has finality in practice. He referred to a *"chorus of observations, from experienced TCC judges and textbook writers to the effect that adjudication does, in most cases, achieve a resolution of the underlying dispute which becomes final because it is not thereafter challenged."* [5]

3) Jurisdiction issue:

Lonsdale's argument was in summary that, upon the operation of insolvency set-off, all claims and cross-claims under the contract between the parties *"ceased to exist, and were replaced by a single claim to the balance".* As such, any dispute was one under the insolvency, not one arising *under the contract* within the meaning of section 108(1) of the Construction Act.[6]

Lonsdale's subordinate arguments in support of this were that (1) the liberal construction given to similar provisions in arbitration agreements set out in ***Fiona Trust and Holding Corpn v Privalov*** was inappropriate as adjudication was imposed by the Construction Act and arbitration was different in kind from adjudication,[7] (2) a narrow construction of the jurisdiction gateway was warranted to avoid the various respects in which adjudication was said to be incompatible with the accounting process required by insolvency set-off, and (3) even if the disputes survived insolvency set-off, the requirement to resolve them all together in a single account could not be accommodated in an adjudication because of the "single dispute" rule, and the limited scope within adjudication for the determination of cross-claims.

Lonsdale's argument failed. In this short note we concentrate on two of the issues.

i) ***Relevance of the arbitration analogy:***
Lord Briggs considered that there is *"little agreement"* on whether the wide approach to

3 At [20] – [26].
4 At [32].
5 At [15].
6 See Lord Brigg's summary at [37].
7 [2007] UKHL 40; [2007] 4 All ER 951 at [39].

construing arbitration agreements confirmed in ***Fiona Trust*** applies equally to adjudication. He stressed that in his view there was little to be gained by an extensive analysis of the closeness of the analogy between arbitration and adjudication for the purposes of applying or not applying ***Fiona Trust.***[8] He therefore did not have to resolve this debate. He considered that the compulsory nature of adjudication in construction contracts was based on Parliament's assessment, following the Latham Report recommendations in 1993, that *"construction adjudication was such a good thing that all parties to such contracts should have the right to go to adjudication",* which pointed towards giving the phrase *"a dispute arising under the contract"* a broad meaning.[9] The fact that the right to adjudicate was statutorily guaranteed was a powerful consideration indicating the caution which the court ought to employ before preventing its exercise by injunction.

ii) Incompatibility with insolvency set-off:

Instead, Lord Briggs decided the issue on the broader question of whether adjudication was compatible with the insolvency set-off regime, holding that it was.[10] The law of insolvency set-off does not compel the liquidator *"to bring all disputes about the claims and cross-claims qualifying for set-off for resolution in a single proceeding"*.[11] Instead, it was perfectly appropriate to *"untangle a complex web of disputed issues arising from mutual dealings between the company and a third party",* including by adjudication.[12] Cross-claims could be resolved by the adjudicator, but a decision may have to be crafted with care if the cross-claim exhausts the value of the claim.[13] Moreover, as a matter of insolvency law, ***Stein v Blake*** was not authority for the proposition that cross-claims which fall within insolvency set-off cease to exist for all purposes after the commencement of the insolvency.[14] A party could still retain its rights as to dispute resolution, including arbitration and, importantly, adjudication.[15] He did accept that the Court of Appeal was correct to hold that if a liquidator was entitled to refer a dispute to arbitration, it would also be referable to adjudication.[16]

4) Futility issue:

This second issue was dealt with more briefly.[17] That does not undermine its importance. Coulson LJ in the Court of Appeal had concluded that:[18]

> "there is a basic incompatibility between adjudication and the regime set out in the Rules. The former is a method of obtaining an improved cashflow quickly and cheaply. The latter is an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors…"

Coulson LJ further added that *"a decision of an adjudicator in favour of a company in liquidation, like Bresco, would not ordinarily be enforced by the court"*.[19] The spectre of wasted expense on the adjudication and the burden on the TCC also weighed with the Court of Appeal.

8 At [41].
9 At [39] - [41].
10 At [42] – [51].
11 At [45] – [46].
12 At [46].
13 At [46] and [49].
14 [1996] AC 243.
15 At [51].
16 At [52].
17 At [54] – [70].
18 At [37].
19 At [45].

Both the cashflow-based analysis of the purpose of adjudication and the views expressed on enforcement in the TCC and the associated costs and burden were rejected by Lord Briggs.

i) ***Adjudication as a valuable dispute resolution method:***
A dominant theme of Lord Briggs's judgment on the futility issue was his strong endorsement of the value of adjudication as a dispute resolution method in its own right. He acknowledged how strongly Coulson LJ, and Edwards-Stuart J in ***Twintec Ltd v Volkerfitzpatrick Ltd,*** had endorsed this futility objection.[20] However, having found that there is jurisdiction, he held that *"it would ordinarily be entirely inappropriate for the court to interfere with the exercise of that statutory and contractual right"*.[21] He accepted that cashflow is *"one important purpose"*, but said *"it is simply wrong to suggest that the only purpose of construction adjudication"* is securing prompt interim payment.[22]

Building on his analysis of the features of adjudication, he concluded construction adjudication has come of age as *"a mainstream method of ADR"*.[23] Earlier in the judgment, he had said it is a *"conspicuously successful addition to the range of dispute resolution mechanisms available for use in what used to be an over-adversarial, litigious environment"*.[24] The short point, central to this decision, is that adjudication is believed to serve a real purpose in achieving *de facto* resolution of most disputes quickly and cheaply.[25] Having dealt with that key point, Lord Briggs dispensed with more technical submissions based on the nature of the insolvency proof process.[26]

ii) ***Relationship with TCC summary enforcement regime:***
The analysis of Lord Briggs on this aspect is quite cursory. He acknowledges the guidance by Chadwick LJ in ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** as to why summary enforcement will often be unavailable, but did not rule out such relief in some cross-claim cases.[27] He also brushed aside concerns about the adjudicator over-valuing the net balance in favour of the insolvent company on the basis that this problem *"may arise in any liquidation context"*.[28] He was content to conclude that these matters are properly resolved at the enforcement stage *"if there is one"*, referring also to restraint on the part of the liquidator in seeking summary enforcement and the discussion of the role of undertakings in ***Meadowside Building Developments Ltd v. 12-18 Hill Street Management Co Ltd.***[29]

In practice, therefore, Lord Briggs' speech might represent the difference between 'nearly never' (as was the result in the Court of Appeal and as discussed in ***Meadowside***) and 'hardly ever' when it comes to enforcement of any resulting order for payment. There are still considerable hurdles for an insolvent company to overcome if it wants to refer a dispute to adjudication with the end goal of recovering a payment that is not vulnerable to a stay application pursuant to the principles set out in ***Wimbledon Construction Co 2000 Ltd v Vago*** as opposed to simply obtaining a declaration.[30]

20 [2014] EWHC 10 (TCC); [2014] BLR 150. At [58].
21 At [59].
22 At [60].
23 At [20] – [26] and [60].
24 At [10].
25 At [13] and [60].
26 At [61] and [62].
27 [2001] 1 All ER (Comm) 1041 at [29]-[35]. At [64] – [65].
28 At [66].
29 [2019] EWHC 2651 (TCC). At [67].
30 EWHC 1086 (TCC); 101 ConLR 99.

Regarding the burden on the TCC, Lord Briggs highlighted that the speed and limited documents in an adjudication meant that if left to proceed it could usually be determined before an opposed injunction application. It was also preferable to deal with objections at the enforcement stage with the benefit of knowing the outcome of the adjudication.[31] The battleground will therefore be firmly at the enforcement stage and, in particular, in an application for stay of a summary judgment.[32] There is a well-stocked body of jurisprudence in the TCC on the circumstances in which a stay will be granted, with sharp distinctions between drawn between formal and informal insolvency, and between the various formal insolvency procedures.

5) Initial comment:

There are a number of important points that arise from Lord Briggs' judgment.

1) The scope of any dispute referred by an insolvent company will be open to challenge in a number of ways. It is not immediately clear how an adjudicator will be asked to deal with a payment notice dispute, where the responding party failed to refer to any defence in a payment notice or pay less notice, if section 110A of the Construction Act is not provided for in the contract. For solvent parties, the answer would be to bring a 'true value' adjudication, following payment: ***Grove Developments Ltd v S&T (UK) Ltd.***[33] A paying party would be unenthusiastic to pay the insolvent company, and then bring a fresh claim (even if it could obtain permission to do so). This is one example of where Lord Briggs' optimistic approach to the jurisdiction of the adjudicator might lead to satellite disputes.
2) As for the futility argument, postponing the futility debate from the interim injunction stage to the enforcement stage could mean that adjudication decisions could be properly rendered but be wholly unenforceable. In between, the costs of the adjudication for the resisting party would be irrecoverable. While it was surprising in theory that a contractual and statutory right to adjudication could be stifled by an interim injunction, as a matter of practice it meant that any concerns as to whether the adjudication itself would be an expensive waste of time were dealt with immediately.
3) The approach taken in ***Meadowside*** and subsequent related cases will come under increasing scrutiny. One likely evolving issue will be the availability of funding for adjudications by funders. Arguments as to champerty were raised successfully in ***Meadowside***. These points might well become even more familiar to practitioners in the future.

BRESCO: AN ANNEXE FROM THE COSTS CORNER

Shaman Kapoor

How will liquidators fund these adjudications and subsequent enforcement proceedings? Let's not forget that liquidators have been exploring methods of funding litigation for years. This has simply become a more certain arena for them to operate in, post-Bresco, but their considerations are fundamentally the same: is it worth spending money (on lawyers) to recoup an asset? What is the value of the asset? How much will the lawyers cost? What if we lose? Will the lawyers put skin in the game? What insurance products are available? Can anyone else fund the litigation so we don't need to take a risk ourselves and become personally liable for adverse costs?

For our part, as solicitors and barristers, we need to be aware of those commercial concerns, if not be able to answer them. Here is a list of pointers to think about...

31 At [70].
32 At [64].
33 [2018] EWCA Civ 2448, [2019] Bus LR 1847.

1) Will the liquidator look to the pool of existing creditors – maybe a Bank – to assist in funding? What does the creditor profile look like?

2) Are there tactical advantages to offering s.108A mechanism to make the process costs-bearing? What are the pros and cons? Will such an offer lay the groundwork in favour or against the application of the ***Meadowside*** exceptions by demonstrating the extent of willingness to offer some form of security for costs?

3) Was there any BTE insurance in place pre-liquidation which may cover some if not all of the legal costs?

4) Can Conventional retainers work?
   – These will be "liquidation expenses", so could the legal costs be recovered through the overall liquidation process (asset pot) irrespective of the fact that these isolated proceedings will not result in costs-recovery for the liquidator?

5) CFAs, CFA-Lite and DBAs
   - Must be a menu of options for the liquidator
   - Beware of arguments on the enforceability of such retainers
   - CFAs – well trodden arena and generally straight-forward in drafting, but nevertheless require expert input;
   - DBAs – the regulations are horrific for a number of reasons; expert input is frankly mandatory; but it will come with caveats – don't forget the problems in ***Meadowside*** which raised issues of champerty and demonstrates the willingness to put the arrangements under the spotlight in order to cast the litigation as an abuse of process; and that champerty therefore bore on the enforceability of the decision;
   - Even though adjudication is not a cost-bearing arena, the type and nature of the retainer could well be relevant and may be called upon to be disclosed in due course; that could carry reputational concerns across a book of cases too;
   - Is it worth exploring the funding arrangements of a party within the adjudication itself in order to put off an unfavourable outcome?

6) Additional liabilities – Success Fees & ATE premiums
   - Additional liabilities in insolvency proceedings brough by a liquidator of a company or an administrator under the Insolvency Act 1986 were "saved" when the general prohibition of recovery came about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") with effect from April 2013
   - The cut-off point for these purposes would be 6th April 2016
   - Is there a benefit to assignment/variation of a previous retainer which carries with it additional liabilities?

7) Litigation Funding
   - Not champerty or maintenance if properly done: must not control the conduct of the action
   - Common place in the England and Wales UK; and recent endorsements in Canada, Australia, etc.
   - Professional funders – Association of Litigation Funders
   - The so-called Arkin cap ***(Arkin v Borchard Lines Ltd (Nos 2 and 3)*** [2005] EWCA Civ 665: CA held that a professional funder who finances part of a claimant's costs of litigation should be potentially liable for the costs of the opposing party to the extent of the funding provided
   - Sir Rupert Jackson had called for the ***Arkin*** cap to be varied so as to make the funder liable for the whole amount
   - ***Davey v Money*** [2019] EWHC 997 (Ch) – Snowden J departed from the Arkin cap and

held there was no absolute rule to a funder's exposure being capped (although that may well be the usual position). It was to be understood as "an approach" which may lead to a "just result", rather than "a rule to be applied automatically in all cases involving commercial funders". The Court's discretion remains broad and factors to be considered include:
  - Any aggressive nature of the commercial agreement struck
  - The multiple of sums involved
  - The priority of payment (waterfall)
  - Whether the lender funds the entire case or only a part of it
- ***Davey v Money*** was affirmed recently in the Court of Appeal, [2020] EWCA Civ 246
- No need for CFA
- Usually a need for ATE
- Price is typically 20-50% of the amount recovered
- Beware of managing the tri-partite relationship as law firms will have their own agreements (and obligations) under their agreement with a funder distinct from those as between funder and client.

SECTION 44(2) ARBITRATION ACT 1996 AND THE COURT'S POWERS IN SUPPORT OF ARBITRAL PROCEEDINGS

Niraj Modha

The recent decision of the Court of Appeal in *A & B v C & D & E* [2020] EWCA Civ 409 confirms that s44(2)(a) of **Arbitration Act 1996** provides the Court with the discretion to compel a non-party to a foreign arbitration to give evidence. This decision is timely. Global travel restrictions are likely to continue for some time in some shape or form, as a result of COVID-19. It may be that more witnesses than before are unwilling or unable to travel. If, in addition, it becomes increasingly commercially unviable to provide for the physical attendance of witnesses in foreign arbitrations, evidence by deposition or other means may become the new norm.

Facts

A and B (**"the Appellants"**) were the claimants in an arbitration seated in New York. C and D were the respondents (**"the Respondents"**). The parties had been co-venturers in an offshore oil field in Central Asia.

A dispute arose in relation to the amount due from the Respondents to the Appellants under settlement agreements. Under those agreements, the Appellants were entitled to a percentage of the sale proceeds of the Respondents' interest in the oil field.

The Respondents had paid "signature bonuses" to a Central Asian government. They calculated the sum due to the Appellants after deducting these payments from the sale proceeds. The Appellants contended that the signature bonuses were bribes. For that reason they were not properly deductible from the net sale proceeds.

The tribunal granted the Appellants permission to apply to the High Court in England to compel testimony from E. E was not a party to the arbitration agreement and was resident in England. He had been a negotiator for the Respondents. E had negotiated directly with another individual on behalf of the Central Asian government. That individual previously had been indicted by a US court for violations of the US Foreign Corrupt Practices Act. The Appellants sought an order requiring E's evidence to be taken in England by deposition under CPR rule 34.8.

Mr Justice Foxton dismissed the Appellant's application. The Judge considered that he was bound by previous High Court authority. However, the Judge also held that, if he had not been bound by prior authority, he would have exercised his discretion to compel evidence from E. Foxton J. granted the Appellants permission to appeal to the Court of Appeal.

Decision

The Court of Appeal (Flaux, Newey, and Males LJJ) held that s44(2)(a) of the 1996 Act applies to non-parties. The Court exercised its discretion to order examination of E by way of deposition.

There were several reasons for the Court's decision. The Court rejected the argument that s44(2)(a) only relates to domestic arbitrations. Section 2(3) expressly provides that s44 applies to foreign-seated arbitrations. When read with s82(1) and s44, this confirms that the Court has the same powers in respect of non-parties in foreign arbitrations as it does in domestic legal proceedings. Furthermore, the reference to "witnesses" in s44(2)(a) could not be conceivably be limited to witnesses who were also parties. Section 44(2)(a) extended to witnesses who were not in control of one or the other of the parties. Parliament had chosen its words carefully. The Act differentiated between parties and witnesses elsewhere in other provisions. Finally, s44(2)(a) replaced s12(6)(d) of Arbitration Act 1950. That had applied to non-parties. The wording of s44(2)(a) was even wider in scope than its predecessor provision.

The Court of Appeal acknowledged that Foxton J. had followed the reasoning in recent Commercial Court decisions. But these concerned other powers in s44(2). Any comments in those decisions about other sub-sections of s44(2) were obiter. None of those decisions had examined the extent of the power in s44(2)(a) specifically.

Analysis

This decision is notable for five main reasons. First, it is significant that the power in s44(2)(a) applies to non-parties. Tribunals cannot make such orders against non-parties. This is welcome news for parties in foreign-seated arbitrations where recalcitrant witnesses are based in England and Wales.

Second, this decision provides a contrast to recent decisions of the Commercial Court. These have indicated that various powers in s44(2) are not exercisable against non-parties. In *Cruz City 1 Mauritius Holdings v Unitech* [2014] EWHC 3704 (Comm.), Males J. held that the Court could not grant a freezing order under s44(2)(e) against the subsidiary of an award debtor which was not a party to the arbitration agreement. In *DTEK Trading v Morozov* [2017] EWHC 1704 (Comm.), Sara Cockerill QC sitting as a Deputy High Court Judge held that the Court did not have jurisdiction under s44(2)(b) to make an order requiring the preservation and inspection of documents in the possession of a non-party.

Third, the Court of Appeal left open the question of whether other powers contained in s44(2) may be exercised against non-parties. The Court of Appeal did acknowledge that the language in other sub-sections of s44(2) is different. It may well be that some of the powers in s44(2) will apply to non-parties while others will not. Conversely, it may be that there is no sensible or justifiable distinction between the sub-sections. In this respect, the Court's understandable unwillingness to expressly overrule either *Cruz City* or *DTEK* means that it is likely that this case is not the last word on s44(2) and non-parties. This decision may now lead to a re-consideration of whether other powers contained in s44(2) are exercisable against non-parties.

Fourth, the decision creates a curious anomaly. In the absence of an inwards letter of request, a Court in England and Wales cannot order a deposition in support of foreign court proceedings. However, by virtue of s44(2)(a), a Court may order such a deposition in support of foreign arbitral proceedings. This is a peculiar outcome. However, this was not considered a good reason to limit the scope of s44(2)(a).

Fifth, the Court by implication approved the statement of Moore-Bick J. in *Commerce & Industry Insurance Company of Canada v Certain Underwriters at Lloyd's* [2002] 1 WLR 1323 as to the relevant factors when exercising the discretion under s44(2)(a). Essentially, the greater the inconvenience to the witness, the more

fundamental and germane his or her evidence must be. This is important. It is a reminder that applications under s44(2)(a) are not guaranteed to succeed and they demand careful preparation and consideration.

COVID-19: TRANSPARENCY, INTEGRITY AND FRAUD ON PUBLIC AUTHORITIES

Rose Grogan
Philippe Kuhn

Public authorities are playing a central role in the Government's response to the challenges brought about by Covid-19.

Enormous sums of public money are being made available to support supplier cash flow during the pandemic. Public authorities must act to ensure that suppliers at risk are in a position to maintain required services as far as possible and resume normal contract delivery once the outbreak is over.

The Cabinet Office has published information and guidance for public authorities on such payments in Procurement Policy Note ("PPN") 02/20.[1]This has been supplemented by a series of guidance documents and model interim payment terms for supply and construction contracts.[2]

PPN 02/20 is clear. Public authorities and suppliers should work collaboratively to ensure transparency during this period. Suppliers found to be taking undue advantage or failing in their duty to act transparently and with integrity will face action to recover payments made.

However, at the same time as PPN 02/20 was published, further guidance was issued warning of the inherently high risk that fraudsters will try to take advantage of these emergency measures.

In this article we analyse (1) the main fraud risks, (2) fraud prevention measures and (3) contractual mechanisms to recover money.

Prevention is better than cure. Proving 'fraud' or a lack of integrity or transparency after the event is likely to be difficult and costly. There is a real risk of failing suppliers or contractors going out of business after this crisis or being unable to meet repayments if pursued. It is therefore important to ensure that adequate contractual mechanisms are in place to make it easier and quicker to recover public funds.

1) The main fraud risks:

PPN 02/20 deals with adjustments to public authority practices to help ease the immediate financial pressure on suppliers, contractors and the wider supply chain. The general instruction to public authorities is to maintain payments where possible, use forms of contractual relief short of termination and ensure accelerated payment of invoices.

The tension at the heart of PPN 02/20 and the Government's wider response is that public funds are designated as a central pillar of the crisis response. Public authorities are being encouraged to pay suppliers swiftly and, in some cases, temporarily suspend existing contractual checks and balances. At the same time government policy recognises that this is a climate in which fraud on public authorities is likely to escalate. This can range from wastage of public funds, by suppliers or contractors securing continued payment in full for curtailed or non-essential services, to outright fraudulent payment demands.

When referring to fraud risks, PPN 02/20 and the associated model contract terms (see further below) use the terminology of not acting with the required 'transparency' or taking 'undue advantage'. In this context, lack of transparency refers to shortcomings in making financial information, staff payment records and other

1 See: https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19
2 We have discussed these more fully in a series of articles (see the links below).

reasonably requested data available. Undue advantage is not further explained, but it seems designed for more serious cases where support measures are abused.

Further guidance is found in guidance entitled 'Fraud Control in Emergency Management' published by the Cabinet Office.[3] It recognises the heightened fraud risk at this time and identifies two particular sources of imminent danger:

1) first party application fraud (i.e. the risk that an applicant may misrepresent their circumstances to qualify for new forms of support); and
2) third party impersonation fraud (i.e. the risk that a third party may impersonate a business to access support).

In the public authority context, the first is more likely to be a concern. A supplier or contractor that was already falling short of key performance indicators ("KPIs"), service level requirements ("SLRs"), milestones or timescales may well seek continued payments from public authorities through a Covid-19 relief request, and is likely to secure such funds absent careful vetting and given accelerated processing. The second type of fraud is also a concern where public authorities are required to work with new providers, rather than trusted suppliers, given the scale of demand for certain services or equipment.

2) Fraud prevention measures:

PPN 02/20 and related guidance[4] provides public authorities with a useful toolkit to mitigate the risk of fraud despite the resource pressures and urgency of the crisis response.

a) Targeted identification of payments and the 'open book' approach:

PPN 02/20 makes it clear that:

- Suppliers should be asked to identify in their invoices which elements relate to services they are continuing to supply (i.e. "business as usual") and those which are attributable to the impact of Covid-19.
- Public authorities should avoid payments where there is no contractual volume commitment to supply.
- Particular care should be taken when dealing with suppliers who have a history of underperforming, in particular if they were subject to an existing improvement plan.
- As a condition of payment support, suppliers must agree to operate on an 'open book' basis and make cost data available to the public authority.

Operating on an "open book" basis is at the core of what is meant by 'transparency'. It is widely defined in PPN 02/20 as making available to the public authority *"any data, including from ledgers, cash-flow forecasts, balance sheets, and profit and loss accounts, as required and requested to demonstrate the payments made to the supplier … have been used in the manner intended."* That broad definition is mirrored and improved upon in the Model Interim Payment Terms[5] for variations of general supply contracts and the model terms in the 'Guidance Notes for Construction Contracts'.[6] Public authorities ought to familiarise themselves with and consider using the detailed and different definitions of "Open Book Interim Data" in these model terms.

3 See: https://www.gov.uk/government/publications/fraud-control-in-emergency-management-covid-19-uk-government-guide?utm_source=30f87e98-c1e1-40b9-a90a-d49a421420ef&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

4 For more detail see: https://www.39essex.com/important-updates-to-ppn-02-20-procurement-guidance-for-contracting-authorities/

5 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877260/PPN02_20_Model_Interim_Payment_Terms_v1.pdf

6 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886108/PPN-02_20-Additional-guidance-FAQs-and-model-terms-for-construction.pdf

See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877260/PPN02_20_Model_Interim_Payment_Terms_v1.pdf

b) New auditing and verification practices:
PPN 02/20 advises public authorities to continue to undertake necessary checks, but to resolve any issues urgently and to reconcile minor discrepancies at a later stage. Careful but speedy auditing and verification practices are critical. More concrete recommendations are found in the 'Fraud Control in Emergency Management' guidance including:

- Integrating fraud control personnel into the policy and process design to boost understanding of fraudulent patterns as they begin to emerge.
- Using low-friction counter measures to prevent fraud risk where possible.
- Undertaking post-event assurance checks to look for fraud.
- Keeping under review the distinction between emergency payments and longer term services, and revisiting the control framework periodically. As we get closer to the second stage of the crisis response with forthcoming relaxations of lockdown arrangements, such reviews should be considered.

c) Trusted suppliers and blacklisting:
One key risk mitigation measure is to make use of existing trusted suppliers – either through framework agreements or, where possible, flexibilities in the procurement regulations which permit direct awards. Where public authorities have existing framework agreements with trusted suppliers, turning to these to meet increased demands is likely to reduce the risk of third party fraud. However, any new contracts or amendments to existing contracts or framework agreements will need to comply with established procurement and/or competition law rules (which have not been relaxed or amended in response to the pandemic). In particular, any amendments to existing contracts or framework agreements must comply with regulation 72 Public Contracts Regulations 2015 where this applies.[7] Particular care should be taken around amendments to payment provisions, which may alter the allocation of risk in favour of the contractor.
The procurement regime also provides a form of deterrent to fraud and 'undue advantage'. Regulation 58(7) of the Public Contracts Regulations 2015 gives contracting authorities the discretion to exclude bidders from participating in a procurement process where the contracting authority can demonstrate that the bidder is guilty of grave professional misconduct, which renders its integrity questionable. The concept of professional misconduct is not limited to the standards of the profession to which the operator belongs, and can include other wrongful conduct (see *Consorzio Nazionale Servizi Società Cooperativa (CNS) v Gruppo Torinese Trasporti Gtt SpA,* Case C-425/18). In the context of coronavirus, the FAQs on PPN 02/20 include a warning that suppliers who make fraudulent claims under the Coronavirus Job Retention Scheme or other support schemes may be excluded from future procurement (see Q13).[8] Establishing grave misconduct may well be difficult for a public authority – especially in circumstances where there is only a suspicion of wrongdoing and so it is not clear how helpful this particular provision will be in practice.

d) Comprehensive record-keeping:
The need to keep comprehensive records in this period cannot be over-emphasised. Public authorities undoubtedly face considerable time and resource constraints. Yet, creating and maintaining full and contemporaneous records of issues with suppliers, relief requests, variation terms and payments will prove vital down the line. Such records will enable future

7 Contracts and framework agreements may be modified without a new procurement process if the modifications meet certain criteria set out in Regulation 72(1)(a)-(f).

8 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876498/PPN_02_20_FAQs_27_03_20__1_.pdf

reconciliation and guard against suppliers taking 'undue advantage'.

e) Time-limited arrangements:
Given the continued operation of procurement rules, as clarified in PPN 01/20,[9] where public authorities are looking to fulfil immediate needs, care should be taken before committing to longer term arrangements. Beyond short-term adjustments to payment models and information-sharing, it is advisable to seek detailed legal advice before agreeing to new or varied supply arrangements or to termination.

3) Contractual mechanisms for recovery:

Careful and tailored drafting of terms in any variation or new agreement will be of vital importance. Contractual clawback clauses are the main tool available to public authorities. Both sets of model interim payment terms are a useful starting point.

Model clause 7 in the Model Interim Payment Terms includes an express power for the Authority to take *"all action necessary"* to recover any payments made. This includes a widely framed right to retain or set-off *"payment of any amount it owes to the Supplier at any time under this Contract or any other contract"*. That contractual right is triggered by one of four specified events in sub-paragraphs 7.1-7.4:

1. Failing to *"meet any obligation set out in this Variation"*.
2. Receiving *"any payment"* and failing to *"apply it to meet any proposal in the relevant Interim Payment Proposal"*.
3. Taking *"undue advantage of any relief"*.
4. Failing to *"act transparently and with integrity"*.

We have already commented above on the meaning of 'undue advantage', transparency and integrity in this context. Overall, while the specified trigger events are broad, it is prudent to treat these model terms as a starting point only, to be supplemented by more specific provision where possible. For example, it may assist to expressly provide for contractual clawback in other circumstances, such as for failing to comply with specific revised KPIs, SLRs, milestones or timescales. Similarly, the time of accrual of recovery rights and the interplay between such rights and dispute resolution mechanisms, both in and out of court, are areas that are likely to warrant attention, especially in higher value or longer term contracts.

More detailed draft terms have been made available for construction contracts, in the form of model deeds of variation for NEC3 and JCT standard form contracts.[10] They deal thoroughly with the implementation of relief options, including the scope of the 'open book' approach (see NEC3 model clause Z2.1 and JCT model clause 10.1). There is also fuller provision for recovery of payments, including recovery as a contractual debt (see NEC3 model clause Z2.3.3 and JCT model clause 10.3.4).

For completeness, remedies under the general law of unjust enrichment are not available where the payment was made pursuant to a contract that remains enforceable: see e.g. *Fairfield Sentry Ltd v Migani* [2014] UKPC 9; [2014] 1 CLC 611 at [18]. It plays a residual role, applying in cases where there is a contractual vitiating factor (such as mistake, frustration or misrepresentation) that would allow the public authority to challenge the validity of the supply or construction contract and then avoid the contract, or where there was no contractual basis for payment in the first place.

4) Conclusion:

Overall, public authorities face a considerable challenge in continuing their vital activities and support for affected suppliers and contractors, while mitigating and preparing for heightened fraud risks. Prevention is better than cure and this can be achieved through a combination of targeted auditing practices, working with trusted

9 See: https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19

10 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886108/PPN-02_20-Additional-guidance-FAQs-and-model-terms-for-construction.pdf

suppliers, time-limited variations, warnings to suppliers and comprehensive record-keeping. As for remedies, drafting of contractual clawback clauses should be high up on the agenda and public authorities should consider going beyond the model contract terms made available. Costly and uncertain evidential and legal disputes are best avoided.

Key materials:

'Guidance notes on Model Interim Payment Terms – PPN 02/20' (Cabinet Office) (06.04.2020):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877260/PPN02_20_Model_Interim_Payment_Terms_v1.pdf

'Guidance Notes for Construction Contracts - PPN 02/20' (Cabinet Office) (06.04.2020, updated 19.05.2020):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878338/PPN_02_20._Additional_guidance__FAQS_and_model_terms_for_construction.pdf

'Fraud Control in Emergency Management' (Cabinet Office) (26.03.2020):

https://www.gov.uk/government/publications/fraud-control-in-emergency-management-covid-19-uk-government-guide?utm_source=30f87e98-c1e1-40b9-a90a-d49a421420ef&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

'Procurement Policy Note 02/20' (Cabinet Office) (20.03.2020):

https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19

'Procurement Policy Note 01/20' (Cabinet Office) (18.03.2020):

https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19

Previous articles:

'Important updates to PPN 02/20: Procurement guidance for contracting authorities' (09.04.2020):

https://www.39essex.com/important-updates-to-ppn-02-20-procurement-guidance-for-contracting-authorities/

'Fraud Control in Emergency Management: Covid-19 Guidance' (27.03.2020):

https://www.39essex.com/fraud-control-in-emergency-management-covid-19-guidance/

'Local Authority Commercial Contracts and Procurement in a Covid-19 World' (25.03.2020):

https://www.39essex.com/local-authority-commercial-contracts-and-procurement-in-a-covid-19-world/

LAWYERS AT HOME, AROUND THE WORLD ROUNDUP: PART ONE

James Bradford

In mid-May, 39 Essex Chambers launched a brand new series called 'At Home, around the World'. In these short videos, a number of different members of Chambers based all over the world came together with a host of different expert jurists, practitioners and commentators for a series of informal conversations. Based in their different locations across Europe, Africa and Asia, these individuals brought their considerable experience and unique insight to bear on various different topics, which ranged from the impact of COVID-19 and the public health restrictions which have followed to a consideration of what the future may look like for the legal profession and the world in general after this crisis abates.

This short article is intended merely as a summary of some of the conversations which have been had: of course, all the episodes are available in full on YouTube and on the 39 Essex webpage 'At Home, Around the World'. These roundups will be published periodically as further episodes are launched and the videos have been uploaded at different times, with the conversations reflecting the situation as it was developing at the time of recording.

Episode One: Edwin Glasgow QC and Justice Edwin Cameron

In the first episode of the series, Edwin Glasgow QC (based in the United Kingdom) spoke with Justice Edwin Cameron (in South Africa). The two eminent jurists reflected deeply on a wide range of themes including how COVID-19 might impact the operation of the law and what changes will necessarily follow as a result. Justice Cameron placed the discussion within some historical context, noting the experience in the mid-1980s and since with the HIV/AIDS epidemic, and how this situation may prove to be a moment to rethink how we practice law and the way in which we think of each other more generally. One way in which South Africa has taken steps in reforming the law is to make it easier to use mediation and arbitration as paths to accessing justice.

Indeed, Edwin Glasgow QC reflected that one of the positive consequences of the adjustments which societies have been forced to make is the practical changes that are likely to take place in the context of international arbitration and in particular, the probability of it being a most cost-effective process (with fewer international trips). However he expressed some reservations about how permanent the move to online hearings will be in the future, given the more difficult challenge of handling witnesses virtually rather than in person.

Both jurists noted that there is likely to be an influx of 'force majeure' type claims arising out of the present situation, with parties having committed to commercial and civil obligations which they cannot perform due to the inherent interruption brought on by the pandemic. This led them to consider whether different kinds of dispute resolution mechanisms are required (perhaps even non-adversarial) in order to avoid any legal system being overwhelmed.

They also went on to discuss the specific situation in South Africa and in England and how the legal systems are coping with life during the pandemic, in particular considering how the criminal justice is operating, the challenges of jury trials during these times and the position in South Africa (at the time of recording) with regards to overcrowded prisons.

Episode Two: Peter Rees QC and Philip Rodney

In the second episode of the series, arbitrator and practitioner Peter Rees QC chatted with Philip Rodney, former chair of Burness Paull LLP and commentator for The Times who is based in Glasgow, Scotland. The two began by discussing Philip's experience of lockdown in Scotland and how the situation there has differed from the rest of the United Kingdom. Philip reflected on the impact which the public health restrictions had on his working practices and the increased use

of videoconferencing and how this compares to the other forms of communication available. In particular, they discussed how the phenomenon of video conferencing may be more exhausting then alternatives such as holding the meetings over the phone, because of the effort involved in trying to pick up visual cues which one wouldn't do when just listening into a phone call.

Although Philip believed that video conferencing may be here to stay, he wondered whether it may be a case of thinking more about how it can be impactful and to think about it as a production, working out what each participant's role might be and what time is needed.

They also reflected on a recent article that Peter had written about how these restrictions might stimulate creativity and how certain limitations themselves can release creativity. The conversation moved on to considering ways in which the legal profession can be more inventive, what new efficiencies can be created and what new opportunities there may be to be more collaborative as a profession. Indeed, they also considered that the COVID-19 pandemic might lead to a wider re-evaluation about how society sees and considers different professions.

Episode Three: Asian Arbitral Institutions with Swee Im Tan

In the third episode of the series, Swee Im Tan explores how three of the world's leading arbitral institutions in Asia have coped with the pandemic as she catches up with Eric Ng (HKIAC), Kevin Nash (SIAC) and Tatiana Polevshchikova (AIAC).

Towards the start of the conversation, Kevin noted that the institutions were well-placed as arbitration is a pretty adaptable and flexible process such that in this tragic and difficult situation, the arbitral institutions have been able to run things remotely and smoothly. Indeed, he was surprised as to how busy things were and how work had not slowed down. In Hong Kong, Eric noted that they had also been very busy as people began to understand the scale of the pandemic: the institution has had emergency proceedings and nearly all of the hearings have some virtual component with 85% of the cases from April and May being virtual in some shape or form and 65% of all inquiries being in relation to virtual hearings or virtual hearing services.

Swee (who is based in Malaysia at the time of recording) noted the particular problems in that jurisdiction because of emphases on personal service and indeed Tatiana considered that in Malaysia, there were dealing with two different problems at the time of recording: the ongoing appointment of a new director and the COVID-19 situation which had affected adjudication matters and their registration (more so than arbitration issues).

The conversation then moved on to the broader impact of COVID-19 and how the profession stays in contact with each other, including the continued emphasis on online webinars and zoom meetings. Kevin noted that there is a networking element that is important to being at a physical event whilst Eric considered that the use of webinars was not a result of the crisis arising from COVID-19 as they had been in operation before.

The group also considered how the present situation may lead to there being greater scope amongst the arbitral institutions for increased cooperation, with Kevin noting that HKIAC, SIAC and AIAC have a close relationship and that the flexibility inherent in arbitration would mean that if one had (for instance) a dispute with parties from mainland China and Hong Kong with an SIAC administered arbitration who wanted to have the hearing in HKIAC, then this would be perfectly possible. Tatiana also echoed these comments, noting that they were all working towards the same goal of providing effective services whilst Eric also reflected that they needed to continue cooperating in order to create at least some sort of standard for the arbitration community and it was, in his view, the Asian institutions who were leading that charge.

CONTRIBUTORS

Marion Smith QC

marion.smith@39essex.com

Marion specialises in commercial and construction disputes for UK and international clients. She has extensive experience before domestic courts and tribunals, and in domestic and international adjudication and arbitration, including under the Rules of the ICC, LCIA and LMAA and the UNCITRAL Arbitration Rules. She has been appointed as sole and co-arbitrator, adjudicator and an expert determiner. She is vice-chair of the Board of Trustees of the Chartered Institute of Arbitrators and a vice-chair of the International Committee of the Bar Council of England and Wales (2020). She is a Visiting Senior Lecturer in the School of International Arbitration at Queen Mary University, London and a Professional Fellow of Aston University. She is a contributor to the Global Arbitration Review Guide to Construction Arbitration. She is consistently ranked in the leading legal directories and described in one this year as *"Technically superb, great at very complex matters and very personable."* To view full CV click here.

Shaman Kapoor

shaman.kapoor@39essex.com

Shaman's practice covers several fields of commercial and common law with his costs practice bridging over both fields. He is regularly in the High Court and SCCO and receives instructions domestically and internationally. He is a regular speaker at seminars for membership organisations as well as for clients in-house and Chambers' seminar programme. He is frequently instructed for his opinion as an "expert" in costs as a result of the new practice in the SCCO in protected party cases, and he has been regularly trusted by both sides to a dispute through his appointment as Mediator and he has been ranked as a leading junior in costs for many years. He has extended his ADR training to sit as an Arbitrator and Adjudicator on the 39 Essex Chambers ADR panel for civil liability claims and he is also an appointed Deputy District Judge. To view full CV click here.

David Sawtell

david.sawtell@39essex.com

David specialises in substantial construction and property disputes, as well as commercial dispute resolution. He is frequently instructed in cases involving the development and use of land, buildings and property, as well as matters involving serious commercial, insolvency and company law issues. His work frequently has an international edge, involving cross border and overseas transactions and disputes. His clients appreciate his robust advocacy allied to his practical and user-friendly manner. His work is typically legally complex. In 2017 David completed the MSc in Construction Law and Dispute Resolution at King's College, London, achieving a Distinction. He was awarded prizes for the best overall graduate, best dissertation, the best performance in the second-year examinations, and best performance in the Module AL construction technology examination. David is currently undertaking a part time PhD at the University of Cambridge, researching the taxonomic interface between construction law and property law. David is regularly instructed in disputes in the High Court (including the TCC, the Chancery Division, the Queen's Bench Division and the Companies Court) and the Court of Appeal. He is also regularly involved in construction disputes referred to adjudication or arbitration. He is adept in different forms of alternative dispute resolution, regularly representing clients in mediations and joint settlement meetings: he is a Fellow of the Chartered Institute of Arbitrators. To view full CV click here.

Rose Grogan

rose.grogan@39essex.com

Rose Grogan has a multi-disciplinary practice, specialising in environmental and planning law, public law (including commercial public law), and construction law and energy law. She is an experienced advocate, and appears regularly in the High Court, tribunals and public inquiries. Rose is highly regarded across a number of practice areas: she is ranked in Chambers and Partners for environmental law and local government law and regularly features in industry lists of top rated junior counsel (Legal Week's Stars at the Bar, Planning Magazine top juniors under 35, The Planner's women of influence). She is a member of the Attorney General's B Panel of Counsel. She is currently instructed as second junior counsel to the Grenfell Tower Inquiry. To view full CV click here.

CONTRIBUTORS

Niraj Modha

niraj.modha@39essex.com

Niraj Modha specialises in commercial, construction, and property litigation and arbitration. He is ranked as a leading junior in Legal 500, which notes that *"whilst always meticulously prepared, he is also extremely good on his feet"*. Niraj has considerable experience in the Chancery and Queen's Bench Divisions of the High Court and the First-tier Tribunal (Property Chamber). He has appeared in the Court of Appeal as sole counsel and the Supreme Court as junior counsel. Niraj is a Fellow of the Chartered Institute of Arbitrators and sits as an arbitrator. He has conducted more than 20 arbitrations since being appointed as a member of the ABTA arbitration panel. Niraj is also a panel member of the CIArb Business Arbitration Scheme. His arbitration practice is focussed mostly in Asia, Africa, and the Middle East. Before he trained as a barrister, Niraj taught at a secondary school in East London. He often draws on his experiences as a teacher when presenting succinct arguments in document-heavy cases and dealing with urgent matters at short notice. To view full CV click here.

James Bradford

james.bradford@39essex.com

James Bradford accepts instructions across all areas of Chambers' work, with a particular interest in commercial & construction law, international arbitration, public law & human rights and European Union law. Since being taken on as a tenant in 2018, James has already been developing an international practice with a keen focus on international arbitration work. Both during pupillage and since, James has gained experience of different international arbitration matters including, most recently, being instructed as junior counsel on a high-value international trusts arbitration (led by Elspeth Talbot-Rice QC with Andrew Holden at XXIV Old Buildings Chambers). He has a wide range of experience of appearing in different courts and hearings, including as junior counsel in the UK Supreme Court. Prior to coming to the Bar, James worked as a Lecturer in Law at Oxford University, teaching various undergraduate subjects including Contract Law, Human Rights Law and European Union Law to students across different colleges. He is bilingual in Italian and has experience working on different research projects with leading Italian academics: in particular, he has assisted Prof. Guido Alpa (Professor of Civil Law, La Sapienza Università di Roma) and Prof. Attila Tanzi (Professor of International Law, Università di Bologna). To view full CV click here.

Philippe Kuhn

philippe.kuhn@39essex.com

Philippe is building a broad practice across all areas of Chambers' specialisms. He has a particular interest in commercial matters with an international dimension (including arbitration, construction, shareholder, civil fraud, jurisdiction and choice of law disputes) and cases at the intersection of private and public law (including Human Rights Act damages and equality rights claims). This builds on his international background, growing up in Switzerland and Sri Lanka, before reading law at the LSE and Oxford and qualifying as a barrister. He joined Chambers after completing a third six pupillage in March 2020. He was previously a Judicial Assistant at the Supreme Court of the United Kingdom (2018/19), assigned to Lord Briggs, Lord Sumption and Lord Sales. He completed his pupillage at 11 KBW (2017/18) and maintains an interest in commercial and statutory employment matters. To view full CV click here.

Editorial team: Marion Smith QC, Hannah McCarthy, David Hopkins, James Bradford, Ruth Keating, Gethin Thomas

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Deputy Senior Clerk: Andrew Poyser

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085