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Digest

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Welcome

After a short hiatus, we are pleased to present the 25th edition of the ADR *Digest*.

In our guest article, Ian Cocking, Partner at Cocking and Co LLP considers the Court of Appeal decision in *West Kowloon Cultural District Authority v AIG Insurance Hong Kong Limited* [2022] HKCA 975. In this case, compared with the Court of First Instance, the Court of Appeal favoured a strict legal interpretation in determining whether the demand had complied with the terms of the bond. The Court agreed with AIG's complaints that the demand purports to include a claim for future or prospective losses which are not within the terms of the Bond; therefore, the demand was non-compliant with the bond and was thus invalid.

In Hong Kong, contractors and sub-contractors are often under pressure to commence the works on site prior to the execution of a formal contract. Prior to formation of the contract there is often an exchange of multiple iterations of contractual documentation which can result in confusion on what the exact terms upon which the work is carried out.

David Longbottom reviews the recent case of *Balfour Beatty Regional Construction Limited v. Van Elle Ltd*, in which the Court found that a sub-contract covered works carried out by a sub-contractor, even though it was not formally executed at the time the works were carried out. The case also highlighted the need to have clear and unambiguous wording in limitation clauses.

Sometimes provisions concerning the time for completion are absent from a contract. David Longbottom considers the case of *Barkby Real Estate Developments Limited v Cornerstone Telecommunications Infrastructure Limited*, where such a scenario occurred and it was found that the Works should be completed in a reasonable time. The case also gave a recap of the considerations when considering if a loss was too remote to be recovered.

Finally, ADR is pleased to make two announcements: Ms. Karen Hua Xue has joined the ADR Team; and our Patrick O'Neil has been selected by Who's Who Legal as a leading professional in Consulting Experts 2022 (Construction Quantum Delay and Technical).

James B Longbottom
Managing Director

West Kowloon v AIG Insurance: Validity of Bond Call Overturned

By **Ian Cocking** Partner, Cocking & Co

Summary
The Court will read and construe the terms of the demand to call a performance bond objectively based on its plain wording and would not lightly find that the drafter intended to add or use redundant and surplus words.

Overview

It is common for contractors to provide performance bonds to employers to secure due performance of their construction projects. However, disputes often arise when the employer seeks to call the bond, especially an on-demand bond, without proof of default. It may lead to separate court proceedings between the employer, the bondsman and / or the contractor, including urgent and a costly injunction application to stop the bond payment.

Readers may recall that in April 2020, in the case of *West Kowloon Cultural District Authority v AIG Insurance Hong Kong Limited* [2020] HKCFI 569, the Court of First instance appeared to favour an *"in substance compliance"* test in an on-demand bond situation. It was held that the owner's demand for the bonded sum was valid notwithstanding that the demand covered future damages, loss, etc. which fell outside the ambit of the bond.

However, this decision has just been overturned by the *Court of Appeal in West Kowloon Cultural District Authority v AIG Insurance Hong Kong Limited* [2022] HKCA 975, where a stricter approach to interpretation was adopted.

Background and the CFI's Decision

The case concerned a demand bond in the sum of HK$297,198,000 obtained by Hsin Chong Construction Company Limited from AIG Insurance Hong Kong Ltd. It was obtained in favour of West Kowloon Cultural District to secure the due performance of Hsin Chong at the "M+" construction project.

Hsin Chong had become insolvent. As a result, West Kowloon terminated Hsin Chong's employment on the basis that a default had occurred. It has also separately demanded AIG to make payment of the full bonded sum.

Subsequently, West Kowloon applied for summary judgment against AIG and AIG applied to strike out the court action on two grounds:

i) **Formality issue** (i.e. Whether the demands complied with the terms of the Bond when they did not identify the amount of damages sustained by reason of the default); and

ii) **Fraud issue** (i.e. Whether the demands were made fraudulently).

Concerning the Formality Issue, AIG further complained that the demand purports to include a claim for future or prospective losses which are not within the terms of the Bond.

The Court of First Instance decided both issues in favour of West Kowloon – that the demand complied with the terms of the Bond and was not made mala fide. It was held that taking a *"strict compliance"* approach may undermine the certainty and reliability of on demand bonds. The terms of the bond did not require particularization or proof of the amount demanded. Since the demand did refer to damages, losses, etc. sustained, the additional reference to future damages and losses was at most redundant and a surplusage and could be ignored.

> *"as a matter of construction, the court normally expects the drafter to use words chosen to express a meaning and would not lightly find that he intended to add or use redundant and surplusage words".*
>
> Court of Appeal

Court of Appeal's Decision

AIG only pursued its appeal based on the Formality issue.

While the Court of Appeal held that the demand was clearly demanding the bonded sum as it related to Hsin Chong's default under the contract, it agreed with AIG that the bond only referred to *"actual or quantified amounts"*. On a proper construction based on the plain meaning of the words, the bonded sum as demanded included future damages and losses, which were outside the ambit of the terms of the bond. Therefore, the demand was non-compliant with the bond and was thus invalid.

In arriving at this decision, the Court of Appeal expressly stated that, *"as a matter of construction, the court normally expects the drafter to use words chosen to express a meaning and would not lightly find that he intended to add or use redundant and surplusage words"*.

Accordingly, the appeal was allowed with costs of the appeal and 80% of the costs below awarded to AIG. It was also ordered that the sum already paid to West Kowloon be repaid to AIG with interest.

Conclusion

A feature of this case is that it was the surety, AIG, challenging the call on the bond. That is presumably because Hsin Chong had become insolvent and therefore AIG would not be able to recover the money paid out. Ordinarily a surety would probably pay and leave the contractor to challenge the call.

Compared with the Court of First Instance, the Court of Appeal favoured a strict legal interpretation in determining whether the demand had complied with the terms of the bond. A demand will be construed objectively based on the plain meaning of the words - and on this wording, employers cannot call a bond relying on unspecified losses they will incur in the future.

This case will be welcomed by contractors if it will deter some bond calls, and is a clear example of how substantial time and costs (as well as interest on the repaid sum) can be incurred in legal proceedings when a bond is called. Therefore, any decision to call a bond should only be made with legal advice and after careful consideration.

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Balfour Beatty Regional Construction Limited v Van Elle Limited: An Unsigned Sub-contract and Limitation Clauses

By **David Longbottom** Director, ADR Partnership Ltd

Overview

In Hong Kong, contractors and sub-contractors are often under pressure to commence the Works on Site prior to the execution of a formal contract.

In a recent case heard before the Technology and Construction Court in March 2021, between Balfour Beatty Regional Construction Limited (Balfour Beatty) and Van Elle Ltd[1] (Van Elle), Waksman J found that a sub-contract covered works carried out by a sub-contractor, even though it was not formally executed at the time the works were carried out.

The case serves to highlight the unwanted contractual confusion which can occur with the exchange of multiple iterations of contractual documentation (quotations, letters of intent and the like) prior to the formal execution of a contract. Emphasising that construction companies should take particular care at the outset of a project to determine the exact terms upon which the work is carried out.

Mr Justice Waksman's non-binding observations on the potentially restricted effect of the limitation clauses in Van Elle's terms and conditions also highlight the need to have clear and unambiguous wording in these types of clauses. To this end, it is beneficial for construction companies to consider looking at their standard terms.

Introduction

Balfour Beatty (formally known as Mansell Construction Services) was engaged as main contractor to design and construct a sub-sea cable manufacturing facility at the site in Newcastle upon Tyne. The facility comprised a building which housed a Vertical Helix Assembly Machine (VHAM) and North and South Carousels. The carousels were structures which sat on platforms and stored the cables produced by the VHAM until the cables were delivered to their intended location.

The structures required the construction of a considerable amount of Continuous Flight Auger foundations[2]. Balfour Beatty engaged Van Elle to carry out the piling works. The agreed total price for these works was £1.239m.

The first piling was carried out to the North Carousel and shortly after construction excessive settlement was discovered at this location. Balfour Beatty agreed with the Employer to carry out remedial works on a without prejudice basis as to the question of liability. This remedial work involved the replacement of the piling works. The Employer intimated a claim against Balfour Beatty for business losses and Balfour Beatty in turn intimated a claim against Van Elle to recover the remedial costs and obtain an indemnity against any liability established against it by the Employer for further losses.

Van Elle denied liability for a number of reasons:

1. the signed formal sub-contract (Sub-Contract), executed following completion of the piling work, did not govern the parties' rights and obligations in relation to the North Carousel piling;
2. the piling to the North Carousel was constituted by a written quotation from Van Elle dated 28 May 2012 (Van Elle Contract) which was accepted by Balfour Beatty by its conduct in providing a piling platform and permitting Van Elle to start work at that part of the Site; and
3. the Van Elle Contract (unlike the Sub-Contract) incorporated Van Elle's standard terms and conditions (Terms and Conditions), and Clauses 6.6 and/or 6.7 of the Terms and Conditions significantly limited Van Elle's liability to Balfour Beatty for recoverable losses.

On its part Balfour Beatty:

1. denied that there was the Van Elle Contract;
2. considered that the North Carousel piling works were included in the Sub-Contract and any prior contract was superseded and replaced by the Sub-Contract; and
3. contended that if the North Carousel works were governed by the Van Elle Contract, the effect of Clauses 6.6 and 6.7 were much more limited than that alleged by Van Elle.

The questions before the Court were as follows.

Preliminary Issue 1: Is the sub-contract subject to:

(a) the terms of the Sub-Contract which supersedes any prior relationship which may have existed; or

(b) the Van Elle Contract which incorporated Van Elle's Terms and Conditions and the disputed limitation clauses?

Preliminary Issue 2: If the Van Elle's Terms and Conditions applied, what is the proper construction of:

(a) Clause 6.6, if a defect and/or failure is caused by negligence; and

(b) Clause 6.7, which purports to limit Van Elle's liability to certain costs?

Preliminary Issue 1

Balfour Beatty and Van Elle agreed that the Sub-Contract exists as a written agreement. The only question was whether or not the Sub-Contract encompasses the North Carousel works. If it did, Van Elle accepted that its own Terms and Conditions were not incorporated within it. Justice Waksman determined that the issue is therefore one of contractual interpretation.

Justice Waksman found that the relevant overarching legal principle is that stated in paragraph 21 of Balfour Beatty's written opening:

> "*It is that the contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to*

"... the contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean..."

the parties when they entered into the contract, would have understood the language of the contract to mean. The unitary exercise of contractual interpretation involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. The court may take into account the existing factual matrix but may not take account of any subjective interpretation on the part of one or both parties."

Van Elle's case also involved questions of contract formation, so far as the Van Elle Contract is concerned. With regards to contractual formation, Justice Waksman advised that the Court must consider objectively whether the alleged contract had been formed.

In essence, Van Elle's case was that for the North Carousel where excessive subsidence was discovered, seemingly by good luck:

1. a separate sub-contract had been formed (the Van Elle Contract), which remained distinct and sacrosanct from the Sub-Contract (covering all the other Works); and
2. this separate contract (the Van Elle Contract) incorporated additional Terms and Conditions (which Van Elle alleged limited their liability).

The Court found that there had been various iterations of contractual dealings before the Sub-Contract was entered into. These included enquiries, quotations, e-mails, a letter of intent, and various other documents.

In analysing the documents, Mr Justice Waksman noted that before Van Elle would commence the work they required a contractual commitment from Balfour Beatty to pay for the works, i.e. a limited order or a letter of intent (LOI).

On 1 June 2012, Balfour Beatty sent a LOI to Van Elle. The LOI, which did not incorporate the Van Elle's Terms and Conditions, was accepted by Van Elle by a letter dated 11 June 2012.

Justice Waksman observed that the LOI and Van Elle's letter dated 11 June 2012 concluded that the envisaged works were encompassing all of the piling works intended to be undertaken by Van Elle pursuant to the contemplated Sub-Contract, not just some of them.

However, prior to the LOI and Van Elle's acceptance, in an email dated 28 May 2012, Van Elle sent a quotation to Balfour Beatty for the North Carousel piling works which it argued was the contract applicable to the North Carousel works (i.e. the Van Elle Contract) and that this offer was accepted by Balfour Beatty's conduct in providing a piling platform and permitting Van Elle to start work at that part of the Site.

Mr Justice Waksman concluded that this 28 May 2012 quotation (the Van Elle Contract) could not constitute the contractual commitment to pay for the works as required by Van Elle as it originated from Van Elle and not Balfour Beatty, and Van Elle was not willing to commence works based on acceptance by conduct (i.e. without the contractual commitment to pay).

Additionally, the Court found that the parties operated as if there was only one contract, in terms of invoicing and gross valuation of work; both sides used only one job or project number; and importantly only one contract number.

The Sub-Contract was signed by Van Elle and sent back to Balfour Beatty on 8 October 2013. Balfour Beatty signed the Sub-Contract on 13 December 2013.

Following his detailed analysis of the contractual dealings, Justice Waksman considered that whilst it was legally possible for there to have been a separate contract for the North Carousel as alleged by Van Elle, in the circumstances, that was *"completely unrealistic, objectively speaking"*.

The Court ruled that it had no reason to find that the Sub-Contract did not apply retrospectively as intended in the drafting.

It followed therefore that the Court's answer to Preliminary Issue 1 was:

1. the contract which governs the North Carousel works is the written Sub-Contract not the Van Elle Contract; and
2. the Terms and Conditions are not contained within the Sub-Contract and therefore do not apply to the claim in respect of the North Carousel works.

Preliminary Issue 2

Following his findings in relation to Preliminary Issue 1, Preliminary Issue 2 in relation to the limitation Clauses 6.6 and 6.7 no longer required consideration. However, Justice Waksman made some comments on this issue *obiter dictum*[3].

Clause 6.6 of the Terms and Conditions provided:

"Where any valid claim in respect of the Works and Materials which is based on any defect in the quality of the Works or condition of the materials or the failure to meet specification is notified to the Company in accordance with these conditions the Company shall be entitled to repair the Works or replace the Materials (or such part as the Company shall determine) free of charge or at the Company's sole discretion refund the Customer the invoice price (or a proportionate part thereof) but the Company shall have no further liability to the Customer".

Clause 6.7 of the Terms and Conditions provided:

"The liability of the Company for negligence or other default or breach of contract shall (except in the case of death or personal injury) be limited to the:

[a] cost of replacing piles or carrying out alternative remedial work such as underpinning,

[b] the cost of repairing damage to any building to the extent that such damage was solely due to such negligence or breach of contract by the Company and

[c] removal and alternative accommodation costs during the carrying out of such remedial work to the extent and for such period as is strictly necessary due to such remedial work rendering the building or part of it in respect of which costs are claimed incapable of beneficial occupation.

For the avoidance of doubt the Company shall (save in relation to death or personal injury) have no further liability or other liability under this or any other contract or at common law and in particular (but without prejudice to the generality of the foregoing) the Company shall have no liability for [d] loss of profits, loss of business opportunities, liquidated damages payable to any person or the fact that no such liquidated damages became payable costs due to the delaying of any other construction or other works or any other losses of any kind save as clearly and specifically identified in the first sentence of this condition 6.7."

Note: for the following narrative, Clause 6.7 above has been split and presented in various parts with letters added in square brackets - referred to as limbs [a], [b], [c] and [d] respectively).

Waksman J noted that the provisions of Clauses 6.6 and 6.7 appeared inconsistent with each other, and both sides had sought to advance an interpretation of them that would allow them to comfortably co-exist. However, in his view, neither side's submissions clearly enabled that to happen.

With regard to Clause 6.6, given that this clause referred to *"any valid claim"*, which was the precise language employed in Clause 6.1, provided for a 10 year warranty. Justice Waksman considered that it was *"strongly arguable"* (without making a firm conclusion or finding) that the ambit of Clause 6.6 was limited to warranty claims under Clause 6.1. This left Clause 6.7 to apply to any claim in negligence and some other breach of contract.

Turning to Clause 6.7 several issues arose:

1. What was covered under limb [a] and [b] by the phrase, *"the cost of replacing piles or carrying out alternative remedial work such as underpinning, the cost of repairing damage to any building"*.

   Justice Waksman disagreed with Van Elle and considered that the phrase covered more than just the *"direct costs"* of replacement piling. Whilst Waksman J agreed that the costs covered by limb [a], as with [b] and [c], must be clearly and specifically identified (as required by the last sentence of Clause 6.7), that did not alter the fact that the cost of *"replacing piling or carrying out alternative remedial work"* may be much more than just the construction cost of the piles. Hence, he considered that this part of the clause contemplated the costs of the things that had to be done in order to replace the piles, and provided they were reasonably and properly incurred, they were prima facie recoverable. With regards to these costs, Justice Waksman considered these may include the costs of investigating and designing how to replace the defective piling and the cost of removing anything (including the structure above them) which would otherwise prevent the construction of the new piling from going ahead. Justice Waksman did not consider it was necessary to add further specific words to the phrase such as *"the cost of investigation"* or *"the cost of dismantling or removing the building"* to enable recovery of these costs.

   Notably, the Court stated that the wording of the clause did not and could not be interpreted as imposing a financial limit on Van Elle's potential financial exposure and if Van Elle had wanted to limit its financial exposure it could have stated such a limit.

2. What was covered by limb [c] and the phrase *"removal and alternative accommodation costs during the carrying out of such remedial work to the extent and for such period as is strictly necessary due to such remedial works rendering the building or the part of it in respect of which such costs are claimed incapable of beneficial occupation"*.

   In his view, this limb of the clause was directed to the removal and accommodation of people with such costs occurring, for example, where the building above the piles is a house or an office (i.e. related to *"beneficial occupation"*). Justice Waksman agreed with Van Elle and did not consider the limb extended to the costs of removing and re-siting the North Carousel facility (for example removing equipment) to another location to enable operations to be continued elsewhere.

3. Where Clause 6.7 of Van Elle's Terms and Conditions refers to *"cost"* and *"costs"*, the issue to decide was whether these terms exclude or include cost(s) incurred or to be incurred by Balfour Beatty as a result of cost(s) by a third party, claimed from Balfour Beatty (assuming those cost(s) would be recoverable if Balfour Beatty directly incurred them itself).

   Here, Justice Waksman agreed with Balfour Beatty and considered that if Balfour Beatty became liable to the Employer for the costs of replacing the piling or repairs to a building which would have been covered by Clause 6.7, whether Balfour Beatty had done the work itself or commissioned the work makes no difference.

   Conversely, Justice Waksman noted that if Balfour Beatty is liable to the Employer for costs which fall outside limb 6.7 or are, for example, excluded by limb [d], then the fact that Balfour Beatty has a liability to the Employer (due to Van Elle's negligence), will not make these costs recoverable against Van Elle.

Summary

In summary, if Clauses 6.6 and 6.7 became relevant, Mr Justice Waksman's view was that they were unlikely to be as effective in limiting Van Elle's liability as that alleged by Van Elle.

Footnotes:

1. [2021] EWHC 794 (TCC)
2. Continuous Flight Auger is a piling technique which uses a continuous flight auger drill to excavate a hole and concrete is injected into the hole through a hollow shaft under pressure as the auger is extracted to form a piled foundation.
3. An observation made by a judge in an opinion that is not necessary to resolve the case, and as such, it is not legally binding but may still be cited as persuasive authority in future proceedings.

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Barkby Real Estate Developments Limited v Cornerstone Telecommunications Infrastructure Limited: A Reasonable Time for Completion and Remoteness of Losses

By **David Longbottom** Director, ADR Partnership Ltd

Summary

In the recent case of *Barkby Real Estate Developments Limited v Cornerstone Telecommunications Infrastructure Limited* [2022] the Technology and Construction Court held that a contractor was liable to the employer for failing to complete its works within a *"reasonable time"* in the absence of formal contractual provisions fixing a time for the works to be carried out.

This case acts as a reminder to contractors that in the absence of formal provisions, they may be under an implied obligation to complete their works within a reasonable time.

Background

The Claimant (Barkby) engaged the Defendant (Cornerstone) to carry out the removal, replacement, and relocation of a mobile telephone mast a short distance, from a pavement to a location closer to the Development (including a new supermarket). The purpose of moving the mast was to improve the sight line of vehicles leaving the supermarket. Once the new mast was in place, the obstructing mast would be removed.

Part of the Works included the design, which involved excavating a trial pit to a depth of 1.2m. The purpose of the trial pit was two-fold:

1. to establish whether there were any existing services which might affect the works; and
2. to establish the ground conditions for the works.

The Court accepted that the trial pit was adequate for establishing if there were any existing services to be avoided or diverted. However, it did not accept that the trial pit was sufficient to establish whether the design was adequate for the site conditions at the point of mast erection (the foundation design eventually proposed a deeper 3m deep foundation).

Cornerstone finalised its original foundation design for the relocated mast by the end of March 2019. Unfortunately, when the foundation excavation took place on 23 October 2019, gravel and standing water was discovered. As a result of these actual ground conditions, the design was deemed unsuitable and a redesign of the foundation was required.

Barkby's case was that the Development was completed on 30 June 2020; however, it could not be handed over to the purchaser at that time because the sight lines were still obstructed by the old mast which had yet to be removed.

The Court found that Practical Completion for the whole of the works was achieved on 7 August 2020 when Cornerstone completed its works. The difference between 30 June 2020 and Practical Completion was because Cornerstone's works were critical to Practical Completion.

The ground conditions issue resulted in a delay to completion of Cornerstone's works by about five months, which in turn critically delayed Practical Completion and the date for handover of the Development (albeit by a lessor duration). As a consequence, Barkby sought to recover finance costs and other losses from Cornerstone which it considered had resulted from the delay in handover.

> *"When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time..."*
>
> **Lord Watson**

What were the Terms of Cornerstone's Contract with Barkby?

The Court found that by the time the matter came before them, there was no suggestion that there was no contract. Cornerstone's quotation was an invitation to treat, Barkby's acceptance of the quotation was an offer, accepted by Cornerstone's acknowledgment of payment, thereby forming the Contract on 5 September 2019.

However, there were no express provisions in the Contract as to the time for completion of the Works. As a result, both parties and the Court agreed that there was an implied term as to time for performance, by operation of Section 14 of the *Supply of Goods and Services Act 1982*, a term that the *"supplier will carry out the service within a reasonable time"*. Hong Kong has similar provisions under the *"Supply of Services (Implied Terms) Ordinance"*, Cap 457, Part II, Implied Terms, paragraph 6, as follows:

> ***"Implied term as to time for performance***
>
> 1. *Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, is not left to be fixed in a manner agreed by the contract or is not determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.*
> 2. *What is a reasonable time is a question of fact."*

Both parties also referred to *Hick v Raymond & Reid* [1893] AC 22 in which Lord Watson said at page 32:

> *"When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding*

protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably."

What is a 'Reasonable Time' for Completion

In answering what was a reasonable time for completion, the Court considered it was entitled to and should take into account what actually happened. Both counsel agreed that the crucial issue was who took responsibility for the five month delay as a result of the unsatisfactory ground conditions.

On the basis of the evidence, the Court had no doubt that a competent designer would have called for a geotechnical survey to be carried out before finalising the design. However, this was not done. Consequently the initial design was inappropriate. Further, the Court noted there was no explanation as to why it took five months to resolve the design issue and that at most a couple of months would have been needed to resume the works on site.

The Court noted that the problem was then compounded by other issues including:

1. releasing the previously ordered mast to another site.
2. allowing the contract for supply of fibre to lapse.
3. Cornerstone being very busy at the time, working on about 50 contracts.

The Court also found that Cornerstone was aware that the execution of their works was necessary to enable Barkby to comply with its obligations and that the Development contract duration was only eight months.

In the circumstances, the Court had:

"... no hesitation in holding that the Cornerstone works should have been completed well before 30 June 2020, and would have been but for matters for which Cornerstone is contractually responsible."

The Claimant's Entitlement to Damages and Remoteness

As a result of the findings there were two questions before the Court:

1. If Cornerstone breached its obligation as to time, is Barkby entitled to damages, and, if so, in what amount?
2. Were Barkby's losses too remote?

The Court found these two questions were inextricably linked. Ultimately, Barkby pursued two heads of claims for costs which it wished to recover:

1. additional project finance costs; and
2. additional project management costs.

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*"The general rule is that loss is too remote if that type of loss could not reasonably have been contemplated by the defendant as **a serious possibility** at the time the contract was made assuming that, at that time, the defendant had thought about the breach."*

Additional Project Finance Costs

As regards Cornerstone's contention that this loss was too remote to be recoverable, the Court noted the legal principles applicable in deciding whether the loss claimed was too remote had recently been restated by the Privy Council in Attorney General of the *Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18; [2021] AC 23 at [29] to [35] of the Judgment of Lord Hodge DPSC:

"29. More recently, Professor Andrew Burrows [now Lord Burrows JSC] *in A Restatement of the English Law of Contract (2016), in which he was assisted by an advisory body of academics, judges and practitioners, described the general rule on remoteness of damage in contract in these terms (p 128):*

*" The general rule is that loss is too remote if that type of loss could not reasonably have been contemplated by the defendant as **a serious possibility** at the time the contract was made assuming that, at that time, the defendant had thought about the breach."* [Emphasis added.]

Drawing on The Achilleas [2009] AC 61, the text went on to state a further restriction on recoverability for the loss. But, as the Board has stated, the question of such a restriction does not arise on this appeal.

30. From this brief review of the main authorities, the position may be summarised as follows:

31. First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.

32. But, secondly, the party in breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.

33. Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.

34. Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.

35. Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as a result of a breach of their contract is a factual one."

On an analysis of the facts, the Court considered that Cornerstone knew, or should have appreciated by February 2019 (i.e. prior to forming the Contract on 5 September 2019):

1. that the Development had a relatively short contract duration;
2. an integral part of achieving satisfactory completion of the Development was the mast removal; and
3. that the Development had been forward sold to Hastings Borough Council.

The Court decided that there is no reason to assume that Cornerstone knew in any detail of Barkby's financial arrangements for the Development, however, any intelligent consideration would have made them realise that:

1. there was a serious possibility that Barkby would have some sort of financing arrangement in place, and

2. Barkby's final ability to pay off that financing would be tied to Practical Completion of the Development (which included Cornerstone's works).

For these reasons, the Court ruled that the financing costs were not too remote and were recoverable albeit only after 21 July 2020 (since after Practical Completion it still took 21 days for the transaction to complete).

The Court was reassured in this conclusion by the decision of H.H. Judge Thornton Q.C. in *Earl's Terrace Properties Limited v Nilsson Design Limited* [2004] EWHC 136 (TCC) particularly paragraphs [60] to [65], where the learned judge held that financing costs were not too remote to be recoverable.

Additional Project Management Costs

The Court was satisfied on the evidence presented that the additional time and work involved by the project management was because of Cornerstone's delays and that Cornerstone should be responsible for these costs.

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ADR | News

New Consultant at ADR

We are very pleased announce that Ms. Karen Hua Xue BSc, MSc has joined the ADR team. Karen is an experienced consultant with over 5 years' experience in delivering large scale, complex infrastructure and building construction projects both in Hong Kong and Mainland China.

Karen has already proven her skills in the management, negotiation and settlement of large infrastructure claims whilst recently been employed to assist two of ADR's Quantum Experts in a large value mediation, and a large value arbitration. She is currently studying for a Masters of Laws in Arbitration and Dispute Resolution at City University of Hong Kong.

We are sure that her skills will continue to benefit and contribute to the services ADR provides and assist our clients in achieving their goals. We hope you will join us in welcoming Karen.

Who's Who Legal: Consulting Experts 2022

Patrick O'Neill, Director of ADR, has recently been selected by Who's Who Legal's independent research with clients and peers as a leading professional in Consulting Experts 2022 (Construction Quantum Delay and Technical).

Who's Who Legal advises that: ***"Patrick O'Neill is 'a very experienced quantum expert' with 'vast construction experience'. He is noted by sources as 'highly skilled in focusing* [on] *the most relevant issues".***

A Chartered Surveyor with a degree in Law and over 30 years' experience, Patrick is regularly appointed as an expert witness in quantum and has provided such services on over 40 occasions.

ADR | Diary

Forthcoming Events 2022

We are glad to see that with the gradual and orderly opening up of Hong Kong, the ADR Diary is starting to fill up.

Our Patrick O'Neill will be speaking at the DLA Piper Global Construction Engineering and Infrastructure Conference 2022, to be held on 24 November 2022. His topic will be *"The waves of disruption (COVID, costs, supply chain) – a global perspective"*.

Further details can be found at www.dlapiper.com.

2022	
3 Nov	*Annual BritCham & KPMG Rugby Dinner 2022, The Hong Kong Football Club*
4-6 Nov	*Hong Kong Rugby Sevens*
9 Nov	*Society of Construction Law Hong Kong: Pre-Annual Conference Cocktails, The China Club*
11 Nov	*Society of Construction Law Hong Kong: Annual Conference, The Hong Kong Football Club*
16 Nov	*Chartered Institute of Arbitrators (East Asia Branch): Annual Dinner 2022, The Hong Kong Club*
24 Nov	*DLA Piper Global Construction Engineering and Infrastructure Conference 2022 – "The Construction Industry: Surviving on Thriving in the Era of Disruption"*
10 Dec	*The Lighthouse Club: Lapdog Challenge, Stanley Ho Sports Centre*

2023	
TBA	*ADR Annual Cocktails 2023*

Based in Hong Kong, ADR Partnership Limited is a dynamic practice of construction professionals providing specialist commercial and contractual services to the construction industry.

If you would like to discuss any of the articles published in this *Digest* or your project requirements, please contact James Longbottom, Patrick O'Neill or David Longbottom at ADR Partnership Limited on **(852) 2234 5228** or e-mail us at **info@adrpartnership.com**

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