

COMMERCIAL DISPUTES WEEKLY – ISSUE 126

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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

"All those subjects were obviously material...They were not dealt with at all in the NZS."

R (On the application of Friends of the Earth Ltd and others) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin), 18 July 2022

Judicial Review – Climate

The Administrative Court has concluded that the Secretary of State for Business, Energy and Industrial Strategy ("SOS") failed to comply with the government's obligations for its net zero strategy ("NZS"). The Climate Change Act 2008 created a framework for reaching the net zero targets. Section 13 of the Act required the SOS to prepare policies and proposals to enable the carbon budgets to be met. For the recent budget, the SOS had not received certain crucial information necessary for the decisions he had to make and so could not comply with his obligations under section 13. Further the SOS's report to Parliament was deficient and did not satisfy the transparency objectives under section 14.

R (On the application of Friends of the Earth Ltd and others) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin), 18 July 2022

Construction – Liquidated Damages

The employer (Peel) under a JCT Design and Build Contract 2016 has successfully upheld a claim for liquidated damages ("LD") under a bespoke LD clause. The contractor's (Buckingham's) arguments that the clause was so defectively drafted as to be void and unenforceable were rejected. Although the position was not clear, the court concluded that the parties intended the bespoke LD regime to apply in preference to the JCT standard clause. As a matter of contract interpretation, the dates for non-achievement of milestones and for completion of works served different purposes. Further, a clause which read "*Cap on Maximum LADs 7.5% £1,928,253.77*" operated simply to limit LDs, not as a general limit on liability.

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC), 15 July 2022

Stay of Proceedings

In a dispute arising out of primary, first and second excess reinsurances, the Commercial Court has refused to stay English court proceedings. The reinsurance related to professional indemnity cover in South Africa and the jurisdiction clauses differed between the primary and excess policies. The centre of gravity of the dispute was held to be South Africa, but the excess policies contained an exclusive English court jurisdiction agreement. Although the court had a discretion to stay proceedings to await the outcome of foreign proceedings, there were no such rare and compelling circumstances to override an exclusive English court jurisdiction agreement. Further the application was an attempted forum non conveniens argument, rather than a genuine case management application. Its purpose was to allow the South African proceedings to be concluded in relation to the primary reinsurances first in order to enable the assured to argue that any issues determined in South Africa preclude the English court from determining the same issues. That was not a legitimate basis for a case management stay.

Axis Corporate Capital UK II Limited and others v ABSA Group Limited and others [2022] EWHC 1870 (Comm), 20 June 2022

Appeal Procedure

Three limited liability partnerships have unsuccessfully tried to challenge the Court of Appeal approach of allowing an appeal on some grounds but not others. The standard practice is to consider whether each of the grounds has a real prospect of success and there is nothing wrong with allowing some grounds on the basis that they raise important points of principle but refusing those that do not. Further, any challenge to the refusal of permission on certain grounds should be brought as soon as possible, not after waiting to see whether the hearing of the permitted grounds was successful. This is particularly so where the argument, as here, was that the refused grounds should be permitted precisely because they were all bound up with the grounds on which permission was granted.

Ingenious Games LLP v Revenue and Customs Commissioners [2022] EWCA Civ 1015, 19 July 2022

Should you wish to discuss any of these cases in further detail, please speak with a member of our London dispute resolution team below, or your regular contact at Watson Farley & Williams:

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