Contract in the Supreme Court: 2017-2018 a year in review

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- *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2017] 3 WLR
- *MWB Business Exchange Ltd v Rock Advertising Ltd (SC (E))* [2018] 2 WLR 1603
- *One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353
- *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2017] 1 WLR 2581

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"*the general principles of construction are, I hope, well-established to the point where they need little discussion*"

Per Lord Mance DPSC in *Taurus* at [86]

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Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil [2017] 3 WLR

- Dispute put to arbitration.
- Arbitration award creditor pursues debt owed to creditor, seeks Third Party Debt Order (TPDO) and receivership order.
- Seeks to reach into debts owed to arbitration award creditor, established by two letters of credit
- Convoluted nature of Iraq oil payments under UNSC Resolutions
- Other aspects of decision

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"*[A] Provided all terms and conditions of this letter of credit are complied with, proceeds of this letter will be irrevocably paid in to your account with Federal Reserve Bank New York, with Reference to 'Iraq Oil Proceeds Account'*

These instructions will be followed irrespective of any conflicting instructions contained in the seller's commercial invoice or any transmitted letter.

[B] We hereby engage with the beneficiary and Central Bank of Iraq that documents drawn under and in compliance with the terms of this credit will be duly honoured upon presentation as specified to credit CBI A/c with Federal Reserve Bank New York"

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Majority

At [19] "*As I see it, it follows from UCP 600 that SOMO was the sole beneficiary in this case*"

At [23] *"…in the absence of a clear statement to the contrary, SOMO was the party to whom Credit Agricole incurred the primary obligation to make payment….each of the letters of credit gave rise to two separate obligations: an obligation to pay the proceeds into the account of CBI in New York, which was owed to SOMO alone and sounded in debt, and a separate collateral obligation to pay the proceeds into that account which was owed to SOMO and CBI jointly and sounded in damages*"

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Dissenting view (Lords Mance and Neuberger)

At [85] the majority were "*forcing the present arrangement in Procrustean fashion, into a pre-conceived model (reflecting the conventional provision when conforming documents are presented by a named beneficiary under a letter of credit) into which it in no way fits*"

At [117] "*[T]he suggested distinction between and co-existence of inconsistent principal and collateral obligations under one and the same tri-partite contract….is a remarkable and to my mind incoherent, novelty in our law*"

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One Step (Support) Ltd v Morris Garner [2018] UKSC 20

Company providing support for young people in care and residential support for vulnerable children;

Shareholder dispute leading to service of “deadlock notice” and buy-out;

Buy-out agreement contained confidentiality agreement and non-competition clause;

Breach of non-competition clause by the defendant establishing a competitor business, ”Positive Living”.

In lower courts, claims were brought for breach of confidence, breach of non-competition clause and for tort of conspiracy;

Remedy sought for breach of contract claim was an account of profits or “hypothetical bargain damages”/“*Wrotham Park* damages”;

Phillips J made “ordinary” compensatory award or, as a result of the difficulty in quantifying the loss, “*Wrotham Park* damages”;

The Court of Appeal disagreed on latter point.

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Lord Reed's Preliminary Points

In Supreme Court, Lord Reed gave the majority judgment, changing nomenclature to "negotiating damages" (at [3]);

Lord Reed considered that such "negotiating damages" had generally been awarded for the torts of conversion and trespass and breach of intellectual property rights (at [26]);

He emphasized that (subject to *Attorney-General v Blake* [2001] 1 AC 268*)* damages were compensatory (at [36]).

Lord Reed also stressed that when assessing contractual loss, "the court will assess damages as best it can on the available evidence" (at [38]);

He also indicated that damages under Lord Cairns Act (now Senior Courts Act 1981, s 50) are not calculated on the same basis as common law damages whatever was suggested in *Jaggard v Sawyer*.

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Nature of Negotiating Damages

With respect to the nature of ”negotiating damages”, Lord Reed (at [72] and [90]) rejected the suggestion that these were:

(a) conditioned by the deliberateness of the contractual breach;

(b) conditioned by the claimant’s legitimate interest; or

(c) gain-based and existing on a sliding scale with an account of profits, as suggested in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323.

Accordingly, after *One Step*, negotiating damages are clearly measured by the claimant’s loss rather than the defendant’s gain and would only be available when the loss is not “measurable by conventional means” and should not be available simply as a “just response” or as part of the court’s discretion (at [91] and [96]).

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Negotiating Damages are Asset-based

According to Lord Reed, negotiating damages are appropriate when “the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset”(at [91]).

Examples of cases in which the breach of contract would result “in the loss of a valuable asset created or protected by the right which was infringed” would include “breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement”.

This dramatically reduces the circumstances in which *Wrotham Park* can be applied and makes clear (at [92]) that gain-based damages for breach of contract (by way of an account of profit) will indeed be truly “exceptional”, as originally suggested in *Blake.*

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Open Points and Critique

Two points left open by Lord Reed: (a) the date for calculating negotiating damages, although Lord Carnwath discusses the point; and (b) the role of Lord Sumption's frolic.

Overall, *One Step*: (a) clarifies the theoretical underpinnings of negotiating damages; (b) confirms the exceptional nature of gain-based awards; (c) links negotiating damages to the loss of a "valuable asset", but why is a right to contractual performance not itself to be considered a "valuable asset"?

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MWB Business Exchange Ltd v Rock Advertising Ltd (SC (E)) [2018] 2 WLR 1603

- No oral-variation clauses or no oral modification clauses ('NOM').
- Previously the latest authorities on the subject were faintly hostile to the clauses (e.g. Beatson LJ in *Globe Motors*).
- Supreme Court backs NOM clauses, saying (at [11]) that the arguments made by the Court of Appeal that NOM clauses would undermine party autonomy were "a fallacy" because "*Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows…The real offence to party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what is agreed*"

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Conceptual disagreement

- If a variation is an agreement (Agreement B), and the parties agree not to agree in the future in a certain way (Agreement A), then how can the parties agree by Agreement A that they can never in the future agree to Agreement B whilst conscious of and intending to override Agreement A? Doesn't Agreement B by its creation destroy Agreement A and its limitations?

- Contrast Lord Sumption's approach at [13] with Lord Briggs at [26] "*What is to my mind conceptually impossible is for the parties to a contract to impose upon themselves such a scheme [i.e. an NOM] but not be free, by unanimous further agreement, to vary or abandon it by the general law*".

- Lord Briggs' proposal that NOM could be varied by unanimous oral agreement "[N]ecessity is in this context a strict test." Suggests mere ignorance of clause insufficient, but conscious abandonment of the clause by the parties in special circumstances (e.g. lack of time) might suffice.

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Other points

- Safeguard against abuse of NOM is estoppel however (at [16]) the scope of any estoppel cannot be so broad as to destroy the whole advantage of certainty in the NOM and "*[A]t the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself*"

- Consideration, does the bell toll for *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 2 WLR 1153 or *Foakes v Beer* (1884) 9 App Cas 605 (HL) E i.e. is a practical expectation of benefit (or the removal of a disadvantage) sufficient for fresh consideration?

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Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain [2017] UKSC 43

The charterparty was terminated two years early, thereby repudiating the vessel's hire;

At the time of termination, there was no available chartering market so that mitigation by re-chartering the vessel was unavailable;

Accordingly, the owners sold the vessel for $23.7m, although the vessel would only have had a "putative value" of $7m at the end of the charterparty if there had been no early redelivery;

The charterers argued that the benefit of achieving a higher re-sale price should be taken into account when calculating the damages for repudiation of the charterparty;

The arbitrator agreed with the charterer's argument, but this was reversed by Popplewell J, who was in turn reversed by the Court of Appeal reinstating the arbitrator's award.

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Lord Clarke considered (at [30]) that the essential question as to whether collateral benefits had to be brought into account when calculating damages was whether “there is a sufficiently close link [between the benefit and the breach] and not whether they are similar in nature”;

Accordingly “[t]he relevant link is causation” and a benefit would only be brought into account if “caused eiher by the breach of the charterparty or by a successful act f mitigation” (at [30)];

The benefit of the elevated sale price in *Globalia* was not the consequence of the of the charterparty’s repudiation as “there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at a particular time” (at [32]);

This analysis was the same even if the “commercial reason for selling is that there is no work for the vessel” (at [33]);

Similarly, the sale of the vessel was not ”an act of successful mitigation”, since the sale of the vessel was “irrelevant” to the “acquisition of an income stream alternative to the income stream under the original charterparty” (at [34]).

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