Contract Law Update

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1. Whilst 'frustration', 'rectification', 'Brexit', 'exclusion for misrepresentation' and 'breach of trust' might sound like words and phrases plucked from columns in a variety of newspapers over the last year, they have also featured heavily in the law reports in three decisions that we will be focusing upon in this contract law review. This review of the previous year in contract will not exclusively focus on the decisions of the Supreme Court as in the previous couple of years at this seminar, but instead upon a trio of first instance and Court of Appeal cases, namely: (i) *FSHC Group Holdings Ltd v GLAS Trust Corporation Limited* [2019] EWCA Civ 1361; (ii) *Canary Wharf (BP4) T1 Ltd c European Medicines Agency* [2019] EWHC 335 (Ch); and (iii) *First Tower Trustees v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396.

(i) FSHC Group Holdings Ltd v GLAS Trust Corporation Limited [2019] EWCA Civ 1361

2. In this case, decided just before the summer recess, the Court of Appeal revisited, and in an emphatic judgment of Leggatt LJ, revised the previous approach by the courts to rectification for common mistake. As the sole judgment makes clear, the law had suffered from confusion since the *obiter dicta* remarks of Lord Hoffmann (delivering the unanimous decision of the House of Lords) in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38. In that case the view was expressed that, as with the interpretation of contracts, the task of the court on cases of rectification for common mistake was in ascertaining the objective (and not subjective) intentions of the parties. In other words, the court was not to be governed by considerations of what the common intentions of the parties actually were at the time that the contract was concluded, but rather by what the court (acting as a reasonable observer) would have thought to be their common intentions at the time that the contract was concluded.

3. The Court of Appeal's decision, which carefully emphasized that it was merely deciding what the House of Lords in *Chartbrook* had not needed to (or actually) decided drew on a wealth of case law stretching back to at least *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves S 317. The court also referred to a volume of academic and extra-judicial commentary to produce a decision that may settle the question of the test for rectification for common mistake for the foreseeable future. More fortuitously still, it may spare future generations from having to identify what precisely was the *ratio* of *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153.

4. The facts of the case concerned a purchase by a private equity firm of a controlling stake in the parent company (hereafter 'Parent') of a provider of elderly care services. In a very brief summary of the facts, as part of the financing exercise an intercreditor agreement was created between interested parties in the transaction in which the parent was to pledge the benefit of a loan (by way of an assignment) as security for certain other liabilities. The Parent failed to do this, although it passed unnoticed at the time of the financing exercise and purchase in 2012.

5. When the mistake was noticed in the course of a 2016 restructuring by new solicitors (who also noticed that any failure to provide for the documents required by the intercreditor agreement was an event of default) it was decided that in the event that any document from 2012 was not discovered then they would simply have to create new security. Rather than creating the missing document from scratch the Parent could merely accede to other security documents (Intercompany Receivable Security Assignments (IRSAs)). The purpose and intention communicated between the parties prior to the agreement was (it was found at first instance) to merely ensure that the benefit of the IRSAs passed to Parent, from Barclays (who acted as security agents for the Defendants who should have transferred the benefit of the shareholder loan under the original 2012 exercise). However rather than merely transferring the benefit of the IRSAs to Parent, the documents prepared ensured that the intended recipient also undertook a number of onerous obligations under the IRSAs.

6. In other words by an error in a 2012 transaction Parent failed to assign certain benefits to another series of companies (who had Barclays acting as their agents). When this was noticed in 2016, rather than transferring merely the benefit of other transactions to Parent, the parties actually executed documents which passed on a series of onerous obligations as well. The court held at first instance that it would have been "commercially absurd" for the documents to have the effect contended for by Barclays, but rather that "objectively" and "subjectively" only the benefit of the new documents (and not the onerous burden) were intended to be transferred. On appeal, Barclays contended that objectively the succession documents were intended to have the additional benefits for their clients and that this could be determined on appeal. However Parent contended that the issue was subjective, i.e. what had the parties actually intended for the 2016 documents to achieve. Therefore the court had to determine whether the test of rectification was objective or subjective.

7. The Court of Appeal traced the development of the cause of action for rectification in equity and held that the key criterion in the older cases[1] evidently depended on a mistake as identified not by what an "objective observer" would have understood but rather by what the parties themselves had actually thought. This arose from the historical equitable justification that to allow a mutual mistake to succeed with one interpretation of a document against the parties shared actual belief in what the document meant would be to "*allow an act, originating in innocence to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice…*".[2] The court noted that for a time (and impressing upon judicial thought beyond the Court of Appeal's decision in *Rose v Pim* [1953] 2 QB 450) there was an idea that the purpose of rectification was to ensure that an "antecedent contract" between the parties was being respected by ensuring the later contract (subject to the claim for rectification) conformed with that earlier agreement.[3] However the court made plain that it was not a necessary ingredient to have an antecedent contract for the purpose of rectification, which could arise in a broader range of circumstances.

8. Notwithstanding the confusion which appears to have plagued the equitable remedy as it has developed, Leggatt LJ's judgment emphasizes that properly understood, the test has been that set out in *Jocelyne v Nissen* [1970] 2 QB 86 i.e. a subjective analysis of what the parties actually understood but "*with the qualification that some outward expression of accord is required*" (at [68]).

9. The court went on (at [72-74]) to justify the retention of the test which ensured that even on an approach premised on subjective intention, there would have to be the requirement for an "*outward expression of accord*". This requirement is not the same as a prior agreement, nor is it needed as part of or instead of evidence of the parties subjective intentions. Instead this '*outward expression of accord*' is a distinct requirement which ensures that even if the parties did have the same subjective intention it would not be sufficient in those shared intentions remained "*locked separately in the breast of each party*" without communication of those intentions to the other party. If therefore the intentions of the parties were identical but remained uncommunicated between them then that would not be sufficient (which amounted to a departure from the view of Mummery LJ in *Munt v Beasley* [2006] EWCA Civ 370). Not only was the requirement of an outward expression of accord reflected in the case law[4] but it was "sound in principle". In justifying why the requirement was justified in principle the court asked the rhetorical question posed in *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65:

   "*If two negotiating parties each had a particular intention about the agreement they would enter, and their intentions were identical but that intention was disclosed by neither of them, and they later entered [into] a document that did not accord with that contention, what would be the*

[1] For instance *Folwer v Fowler* (1859) 4 De G and J 250, where it was said "*It is clear that the person who seeks to rectify a deed upon the ground of mistake must be required to establish…..that the alleged intention to which it desires it to be made conformable continued down to the time of execution*".
[2] Per para [53] citing Story's *Commentaries on Equity Jurisprudence* (4th Edition, 1846).
[3] To that extent the antecedent contract theory ensured that rectification represented (per Lord Cozens-Hardy MR in *Lovell & Christmas Ltd v Wall*(1911) 104 LT 85) a species of specific performance.
[4] The requirement for an outward expression of accord is not present in what at [78-79] of the judgment are referred to as "the pension cases" i.e. where the rectification/amendment of employee pension scheme requires the power to be exercised by the trustees with the subsequent consent of the employer (per *AMP (UK) Plc v Barker* [2001] Pens LR 77). This then is one party approving another party's amendment, rather than both parties communicating and mutually agreeing on the intention behind the amendment.

injustice or unconscientiousness in either of them enforcing the document according to its terms?"

10. However the requirement for an outward expression of accord need not be express, and can be tacit (see para [80-81]), arising therefore from what both parties are known to understand in the course of their negotiations and communications. If an understanding is so obvious that it does not need to be spelled out that can suffice for the outward expression of accord. The Court of Appel rejected (at [85-87]) an attempt to criticise that formulation of the test, although it made clear that the focus should be on what was communicated for these purposes, and the test should not elide with that of an objective bystander for the purposes of implying a term in a contract. The implied term test asks, what would the parties have agreed had they applied their minds to it, whilst in rectification the test is what was actually agreed upon.

11. One interesting aspect of the *FHSC* case was how the Court of Appeal got around *Chartbrook* and *Daventry* and the endorsement of the objective approach in those cases. To that effect the Court of Appeal lingered upon the case of *Britoil Plc v Hunt* [1994] CLC 561 in which (with Hoffmann LJ dissenting) the Court of Appeal concluded that subjective intentions were relevant and the test for rectification was not wholly objective. They also raised the non-binding nature of *Daventry* and *Chartbrook* and finally emphasized that they had delved far further into the case law of rectification than *Daventry* had (indeed *Britoil* was not cited in that case). However, the Court of Appeal also felt that the difficulty and confusion that had arisen post-*Chartbrook* and *Daventry* made the search for the principle behind rectification all the more important.

12. When the case of *Chartbrook* is then discussed by the Court of Appeal it is described as throwing into doubt what appeared to be the settled state of the law. Whilst that case was ultimately determined on a question of interpretation of what the contract actually said (rather than the parties seeking to rectify the contract to reflect a common mistake) Lord Hoffmann (in deciding that the *ratio* of *Britoil* was different to that which the Court of Appeal determine in the *FSHC* case) wished to ensure a common, objective approach between interpretation and rectification.

13. When the Court of Appeal in *FHSC* arrive at *Daventry*, the judgment repeats (rather than endorses) Professor Burrows description that the judgment in the *Daventry* case are "mind-bogglingly difficult"[5] before attempting to extract "general points" from the judgment. However *FHSC* emphasizes the cautious approach by the majority in *Daventry* to the approach of Lord Hoffman in *Chartbrook* and then proceeds to find that the court in *FSHC* is not bound by *Daventry* (and its cautious approach to the objective common intention test) because the Court of Appeal in that case decided to proceed on the basis that *Chartbrook* was correct (as did the parties in *Daventry*) (see para [133]). The Court of Appeal in *FSHC* then reiterated the approach that if a point of law is not argued or conceded (the test does not apply if the point is inexpertly or weakly argued) a court can in a later case decline to treat as binding the authority which stems from that agreement (at [135]).

14. In their assessment of the principles involved in rectification the Court of Appeal were also satisfied that the divergence in the objective approach (interpretation) and a subjective approach (rectification for common mistake) would be consistent with the different principles involved. Rectification (see [55] and [142]) is an aspect of good faith[6] by which equity prevents a party enforcing a contract which records in words a different intention to that which they both personally understood (and understood each other to mean) when the contract was concluded. This can therefore involve a wider survey of evidence and avoid the traditional restrictions on prior negotiations which would arise purely on a question of construction. This differs from the objective basis on which an agreement has to be determined to exist (and on certain terms) before the courts will bind the parties to it. In their essential principles interpretation therefore asks what the contract is, whilst rectification asks whether the parties had intended this to be

[5] Burrows, *Casebook on Contract* (6th Edition, 2019) at 738.

[6] Leggatt J (as he then was) famously made a strong case for reform of English law's approach to contract law and good faith in the landmark decision of *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111. In *FHSC* the court asserted that "…*it is contrary to good faith for a party to take advantage of a mistake made in drawing up a written contract by seeking to apply the contract inconsistently with what that party knew to be the common intention o the parties when the document was created*" (at [55]).

the case, or whether they had intended it to mean something else? The court continued in the *FHSC* judgment to analyse the law as it applied in other areas (for example with unilateral documents) and in other jurisdictions (at [164-174]) to reinforce its conclusions on the need for a subjective approach.

15. Accordingly the *FHSC* case leaves the test for rectification for common mistake as follows (at [176]): (1) does the document fail to give effect to a prior concluded contract or (2) did the parties when executing the document have a common intention in respect of a particular matter which, by mistake, the document did not accurately record? When looking at (2) one must show that each party had the same actual intention with regard to the relevant matter and also that there was an "outward expression of accord" (i.e. as a result of communication between them the parties understood each other to share that intention).

16. As a final note, the case of *FHSC* is also interesting for the (obiter) remarks made on unilateral mistake, where, whilst accepting that the scope of the principle remained uncertain (at [103-106]) the principle behind the doctrine was described as a complement to the principles behind common mistake which served the common purpose of achieving a consistency between known intentions and contractual effect. Whilst in common mistake the consistency was between what both parties intended to be the effect of the contract, in unilateral mistake the principle is extended "*to the situation where a party seeks to apply the contract inconsistently with what that party knew the other party believed to be the common intention of the parties when the contract was executed*". In reading this paragraph it is clear that at least some of the Court of Appeal would be tempted to proffer their thoughts on the scope of unilateral mistake in the near future.

(ii) Canary Wharf (BP4) T1 Ltd c European Medicines Agency [2019] EWHC 335 (Ch

17. This decision of Marcus Smith J made the headlines earlier this year.[7] The case concerned the decision by the European Medicines Agency (hereafter 'EMA') to leave its Canary Wharf premises for Amsterdam following the 23rd June 2016 referendum. The argument advanced by the EMA was that Brexit was a frustrating event for the purposes of the lease that it had with its landlords (described hereafter as 'Canary Wharf'). Canary Wharf brought the matter to court. In a comprehensive exposition of the law of frustration Marcus Smith J decided that the contract had not been frustrated. Since this talk is primarily about contract law, we will focus predominantly on the aspects of the judgment which relate to contractual frustration albeit the areas of the judgment which relate to the legal capacity of international organisations and broader aspects of EU law are relevant to this discussion because it was partly because of their arguments on those areas of law that the EMA argued that the lease had been frustrated.

18. In 2014 the EMA had entered into a lease for premises at Canary Wharf. The judge found that the premises were built to the EMA's specification [61] albeit the input by EMA was also in line with Canary Wharf's view as to what other tenants would want from the premises. It was found (at [56]) that without the commitment from the EMA the property would not have been built. There was an element of self interest in Canary Wharf agreeing to EMA's input on the design. In the lease (para [92-95]) there were detailed provisions on assignment, which included stringent requirements on the financial standing of any proposed assignee of the tenant. The entire lease had to be assigned in full (albeit a group company of the EMA or another EU entity could share the premises). Sub-letting the entire premises required the tenant to obtain such a guarantee as Canary Wharf required. The EMA had been given a substantial inducement to enter into the lease (£40m+).

19. On the issue of defining Brexit itself, Marcus Smith J approached the issue in a staged way by recognising that there were a series of possible scenarios (at least five are mentioned) by which the UK might leave the EU, and therefore the judgment applies 'Brexit' both by asking about the situation if the terms of the EU withdrawal agreement are passed, in a 'no-deal' scenario, in the context of any potential amended withdrawal agreement and in a 'revoke' scenario.

[7] See The Guardian on 20th February 2019, "European Medicines Agency loses battle to end UK lease over Brexit" at https://www.theguardian.com/politics/2019/feb/20/european-medicines-agency-loses-bid-to-end-uk-lease-over-brexit.

20. The EMA argued that Brexit would frustrate the lease because: (i) the tenant would lose immunities and benefits under Protocol 7 TEU and TFEU;[8] (ii) the tenant could not lawful be located in the premises after Brexit; (iii) the tenant could no longer lawfully exercise its rights under the lease after Brexit; (iv) according to the conclusions at (i-iii) the EMA would therefore lose its ability to meet its future obligations under the lease; and (v) the EMA's capacity and effectiveness would be impaired if it had to pay for two premises whilst only using one (in Amsterdam). The further submission (building on the above) would be that the lease would be frustrated by supervening illegality or frustration of common purpose. An additional argument made by the EMA was that if the tenant lacked the power to comply with its obligations under the lease then the court was bound under EU law to fashion a remedy to relieve the lack of power. For good measure, the EMA also sought to have elements of the case referred to the CJEU under the Article 267 (preliminary reference) procedure.

21. On the issues not pertaining specifically to frustration in English contract law (which form the basis of this talk) Marcus Smith J found that: (i) a preliminary reference to the CJEU was not required because the questions of EU law were not "critical" to the decision, but rather amounted to a step on the way to determining under English law whether the lease would be frustrated (at [113-125]); and (ii) there was no remedy in EU law which went beyond frustration as applied by the English courts (at [254-257].

22. The summary of the applicable law on frustration in English law appears at [21-46]. Importantly the *EMA* case does not in its language or approach seek to re-define or extend the law on frustration, but instead casts itself as a case which merely applies well settled law. As is well known, the doctrine of frustration brings a contract a contract to an end because of a supervening event. The court cited the two familiar tests (Lord Radcliffe in *Davis Contractors v Fareham Urban DC* [1956] AC 696 and Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd* [181] AC 675) before endorsing the following propositions:[9]

    (i) the doctrine of frustration evolved to mitigate the rigour of the common law and its insistence on the literal performance of absolute promises and allows parties to escape the injustice of the enforcement of a contract which would result from the literal enforcement of its terms after a significant change in circumstances;

    (ii) The effect of frustration is to kill the contract and therefore it must as a doctrine be kept within narrow limits;

    (iii) Frustration ends the contract forthwith without requiring an act from the parties;

    (iv) Frustration takes place without blame or fault on the side of the party relying upon it.

23. Marcus Smith J then went on to examine (at [21-27]) the juridical basis for frustration (drawing extensively upon the rationales explored in *Panalpina*) and dismissed: (i) the total failure of consideration theory; (ii) the implied condition theory; (iii) frustration of the adventure theory; and (iv) construction of the contract theory as providing a sufficient basis for the doctrines in all circumstances. Rather the rationale appears to be that the performance appears to be radically different to that originally agreed ("*non haec in foedera veni*")[10] because of a fundamental change in circumstances. This test exists because equity recognises the limits of contractual construction as a device to avoid unfairness (at [26] (5) to [38]). Frustration then exists for the case where the parties have not expressly allocated the risk of the event which has occurred but looks beyond the terms to the "common purpose" of the contract. Therefore (see para [29-30]) frustration commences where construction ends, and in cases involving arguments that the "common purpose" has been frustrated involve considering a wider "matrix" or "multi-factor" approach, including:

[8] In essence these benefits (see para [79-91]) confer immunities on the EU and its organisations such as the inviolability of its premises and communications in a manner analogous to the benefits conferred on embassies in international law. Importantly for this decision however (para [85]) these Protocol 7 protections can be waived.
[9] Taken from Bingham LJ's judgment in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.
[10] This is not what I promised to do.

23.1. The contract terms;

23.2. The contractual context;

23.3. The parties knowledge, expectations assumptions and contemplations in particular as to risk as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively.

24. It is the third of these factors which separates frustration from interpretation, and underlies the "common purpose" approach. Expanding upon this rationale by reference to the coronation cases[11] the court said frustration does not arise merely because one party subsequently appreciates that it has made a bad bargain, particularly if the only effect of the event is to cause the benefit to one party (or the detriment to the other party)to appear far greater than originally envisaged. Frustration does not arise merely because the market conditions have altered. The "demands of justice" may play a role, but not a determinative one (at [39]).

25. Frustration cases can be split into classes (at [41]) namely a frustration of a common purpose (described above) and frustration which occurs due to subsequent legal changes and illegality. In cases of supervening illegality (see [190-195]) the court will also have to consider whether the supervening illegality which purportedly frustrates the contract removed all or substantially all of the benefit that one party receives under the contract (at [190-195]). When looking to whether the frustrating event was self-induced (at [206]) the court was looking to answer "*the broad question of whether the supervening event was something beyond that party's control or within it*" or whether post-contractual actions indicate that certain options to ameliorate the frustrating event have been closed off by the party claiming frustration.

26. At the heart of the EMA's case was the argument that the headquarters for the organisation had been required to move from London to Amsterdam by a 2018 regulation[12]. The rationale was that the regulation was a response by the EU to the change in the UK's status from being a member state to a 'third county' post-Brexit. The EMA argued that as a matter of law it had to be located in an EU member state. Additionally the EMA would lose its Protocol 7 protections and be exposed to tortious claims. The EMA also argued that it would be "ultra-vires" the EMA to pay rent after the UK left the EU, but (as the judge noted) this was flatly inconsistent with the argument also run by the EMA that if the lease was not frustrated the EMA would have to pay rent in two places at once (which presumed that the payment of rent was not ultra vires the EMA post-Breixt).

27. The judgment went on to analyse these arguments in detail and determined as follows:

27.1. It was not in dispute that the EMA had had capacity to enter into the lease, rather the issue was whether it had meaningful capacity to dispose of or exercise its rights under the lease after exit day. It was not the case on an interpretation of the constitution of the EMA's capacity (which for the purposes of English law would be governed by the law of the place of incorporation) that after Brexit the EMA would lose the theoretical capacity to acquire, dispose of or retain property outside of the EU. This would particularly apply to property that it already held in a third county. Holding and/or disposing of property in a third county could be costly and difficult, but that did not mean that the EMA lacked the capacity to do so or that it amounted to a frustrating event (see [140-145]).

27.2. Whilst recognising (at [147]) that there was no good reason for the EU to designate an EU organisation to be located outside of a member state (and good reasons why the EU would not do so) this did not mean that it was a legal imperative to be located in an EU member state (at [148]). There was neither a rule of EU law (express or implied)[13] nor a rule of public

[11] That is *Krell v Henry* [1903] 2 K.B. 740 and *Herne Bay Steam Boat Co v Hutton* [1903] 2 K.B. 683. They are so-named because they arise from the rescheduling of the coronation of Edward VII.
[12] Namely Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018.
[13] See para [156-158].

international law[14] which required international organisations to locate their offices in the territory of member states.

27.3. The court declined to extend the law on supervening illegality amounting a frustrating event from cases where the law considered only the place of the performance of the obligation (i.e. the UK) to cases where the court could consider supervening illegality because of a lack of capacity in the place of incorporation (in this case the EU). Therefore any supervening illegality in EU law (i.e. preventing the EMA from continuing to maintain its office in the UK as a third country) would not alter the court's focus on whether the EMA's obligations under the lease had become unlawful in the place of performance (the UK). There was a "clear line" (at [189]) between "…*the capacity to enter into a transaction, and supervening events (including, I consider in relation to capacity) affecting contractual liabilities already assumed*". Therefore this was not a case of frustration due to supervening illegality, but even if it had been the court would not have been satisfied that any supervening had occurred, or had fallen to be relevant for the purposes of frustration, the court was not satisfied that it removed all or substantially all of the benefit that the EMA was to receive under the contract.

27.4. To the extent that any event had occurred which amounted to frustration (specifically directed to whether the EMA was now unable to make use of the premises due to the 2018 regulation) Marcus Smith J (at [201-208]) determined that the EU could have done more to protect the EMA's position and prevent the difficulties now faced by the EMA than simply ordering it to move to Amsterdam. Accordingly even if there had been frustration by supervening illegality the judge said that he found to "*…to be self-induced on the part of the EMA (considering the EMA in its constitutional context within the European Union)*".

27.5. On the question of frustration of common purpose, the court found that the UK's withdrawal from the EU was not relevantly foreseeable at the time that the lease was entered into. Nonetheless there was never a common purpose between the parties that the property was to provide a permanent headquarters for the EMA for the next twenty five years or that the lease would fail if this purpose was not achieved. The court determined that this flowed from the detailed assignment provisions in the lease and the nature of the negotiations (including the EMA dropping their request for a break clause). The court was unpersuaded that the financial burden of maintaining the London lease was something that the EMA had not considered in its detailed budgeting process when committing to a twenty-five year commitment.[15] The EMA's obligations therefore were not rendered "radically different" under the lease, and the court did not believe that there was any common purpose which went beyond the terms of the lease (at [209-250]).

28. Accordingly whilst there would be disadvantages for the EMA in the UK leaving the EU this would not deprive the EMA of capacity to retain property in the UK or prevent the EU from continuing to have the EMA maintain its headquarters in the UK. There was no supervening illegality (and even if there had been it was self-induced) which deprived the EMA of substantially all of the benefit of retaining the London property. Further it would not be ultra vires the EMA to continue to pay rent. There was no frustration of common purpose underlying the lease, because there was no common purpose beyond the terms of the lease between the parties.

29. This judgment is densely argued and addresses a number of arguments to which any summary will inevitably fail to do justice. The judgment does clarify a number of the important underlying principles which underpin the basis of contractual frustration and therefore enables those advising on frustration in future to consider a case with a clearer understanding of the juridical basis for the doctrine.

[14] The glaring example to rebut the clear and consistent practice for any rule of CIL requiring an international organisation to only have an office in a member state was the presence of the UN office in Geneva (see para [152-155]).
[15] Indeed the judge was fairly scathing about any argument that these costs should be considered, when referring to the 2018 regulation (which required there to be another set of premises for the EMA) he said (at [249])"[I]t *lies ill in the mouth of the EMA to contend that simply because additional –and, as I find voluntarily assumed—obligations have been entered into, without apparent consideration as to how they should be funded, the obligation to pay rent under a previously approved agreement should somehow be discharged*".

(iii) First Tower Trustees v CDS (Superstores International) Ltd [2018] EWCA Civ 1396

30. How far can a non-reliance clause go to excluding liability for misrepresentation? Is this type of clause an exclusion clause at all, or merely a way of defining the obligations undertaken by the parties? Perhaps the clause simply allows one party to make clear on what basis he is acting so as to prevent that party later turning around and arguing that he was acting on a different basis instead. If so, does that estoppel merely prevent contractual claims, or does it amount to an exclusion on statutory liabilities too? In this illuminating judgment, the Court of Appeal tackle these questions and row back from some of the more *lassiez-faire* cases on exclusion clauses which have been made in recent years.

31. In 2015 a purchaser (who was the Defendant but pursuing a counterclaim) had sought to purchase a number of properties in Barnsley from the Claimant (the Claimant's claim was settled before trial and so only the counterclaim was extant for judicial determination). The sale was preceded by the normal exchange of enquiries and a mixture of stonewalling and half-answers. In answering the enquiries the Defendant included the following clauses on their responses:

    "*The buyer acknowledges that even though the seller will be giving replies to the enquiries, the buyer should still inspect the property, have the property surveyed, investigate title and make all the appropriate searches and enquiries of third parties.*

    In replying to each of these enquiries and any supplemental enquiries, the seller acknowledges that it is required to provide the buyer with copies of all documents and correspondence and to supply all details relevant to the replies, whether or not specifically requested to do so.

    The seller confirms that pending exchange of contracts or, where there is no prior contract, pending completion of the transaction, it will notify the buyer on becoming aware of anything which may cause any reply that it has given to these or any supplemental enquiries to be incorrect."

32. The Claimant failed to comply with these terms when passing on details which it received prior to the completion of the lease that the properties contained asbestos and could not be entered until remedial work had been carried out. Despite receiving notification of both the inability to enter the premises and the presence of asbestos two weeks prior to the conclusion of the lease the Claimant did not pass this on to the Defendant. The judge found that by representing when completing the enquiries that the landlord was unaware of any environmental or other contamination (or notices of the same) and by failing to update this response when receiving notice of the presence of asbestos, the Claimant had committed a misrepresentation contrary to Misrepresentation Act 1967. The Claimant sought to exclude its liability by relying upon the following clauses:

    Clause 5.8 "*The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord.*"

    Clause 12.1 "*The tenant acknowledge and agree* [sic] *that it has not entered into this agreement in reliance on any statement or representation made by or on behalf of the landlord other than those made in writing by the landlord's solicitors in response to the tenant's solicitors' written enquiries."*

    Clause 12.2. "*Nothing in this agreement shall be read or construed as excluding any liability or remedy resulting from fraudulent misrepresentation*."

33. There was also a clause relied upon by the landlords which stated that the Claimant entered into the agreement "*in their capacity as trustees of the Barnsley Unit Trust and not otherwise*",

which the Claimant alleged limited any liability to the Defendant under the counterclaim in damages for misrepresentation.

34. The judge at first instance (Michael Brindle QC) found that the clause referring to the landlords capacity in the contract to be that of a trustee only limited any liability incurred by the landlords in contract, and not any liability arising under s.2 Misrepresentation Act 1967 as a statutory liability. The "no-reliance" clause was held at first instance to fall foul of the test of reasonableness under UCTA 1977 by seeking to exclude liability for misrepresentation, and was therefore of no effect under s.3 of the 1967 Act. These decisions were appealed to the Court of Appeal. The lead judgment was given by Lewison LJ, with a shorter judgment by Leggatt LJ.

35. The Court of Appeal therefore had to apply s.2-3 Misrepresentation Act 1967, which state respectively:

"*Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true*."

"*If a contract contains a term which would exclude or restrict—(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or (b) any remedy available to another party to the contract by reason of such a misrepresentation, that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11 (1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the terms satisfies the requirement to show that it does.*"

36. The court held that clause 5.8 would on its natural reading purport to have the effect of excluding or restricting liability for misrepresentation on a "but-for the clause" test (at [41]). Equally the Court of Appeal made clear that case law did go further defining limits to exclusion clauses. Firstly, the court had to distinguish between exclusion clauses which in reality defined primary obligations, and those which excluded obligations. The Court of Appeal appeared to distance itself from the approach of Judge Moulder in *Thornbridge v Barclays Bank Plc* [2015] EWHC 3430 which addressed a "no-reliance" clause in that context as a "basis" enquiry (i.e. did the term define the primary obligations to exclude the relevant obligation), and stated that it was undertaking a separate enquiry.[16] Secondly, the Court of Appeal recognised that qualified representations (at [45-46]) might limit a party's liability under s.2-3 Misrepresentation Act 1967.

37. There is also the potential to limit the effect of s.2-3 MA 1967 by (see *Springwell Navigation Corpn v JP Morgan Chase Bank* [2010] 2 CLC 705 para 143) the parties to agreeing that they will proceed on the basis that a certain state of affairs prevail despite knowing that (or not caring whether) that premise is untrue. As was summarised in Springwell "…*there is no legal principle that states that parties cannot assume that certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contact is made upon the basis that the present or past facts are as stated and agreed by the parties*". However the Court of Appeal did make clear that there is a distinction in these so-called "estoppel" cases between an estoppel that takes effect as a matter of contract to preclude a contractual cause of action arising, and an estoppel which prevents a liability for misrepresentation arising (and to this extent departed from *Thornbridge* at [111] where HHJ Moulder found that a contractual estoppel operates both at a contractual level and for statutory liabilities for misrepresentation). Furthermore, even if there is a clause which purports to create an agreement between the parties upon a certain basis, this does not prevent that clause from

[16] Lewison LJ did however state that "*Whether she [HHJ Moulder] was right or wrong in her ultimate conclusion does not arise in this appeal*", which is at least suggestive that the Court of Appeal might not give the *Thornbridge* approach a ringing endorsement if it is directly relevant to an appeal.

having the effect of excluding a liability for misrepresentation, or indeed prevent the court from subjecting that clause to a reasonableness review.

38. Lewison LJ then went on to review (at [51-67]) the case law on s.3 Misrepresentation Act 1967, and was clear that the section had to be read in order to give effect to its evident policy (to prevent contracting parties escaping liability for misrepresentation unless it is reasonable for them to do so). The effect of the clause should therefore form the focus on the analysis. Accordingly, the drafting of non-reliance clauses should not be permitted to defeat the intention of the statute by allowing such clauses to be construed as the basis for a contractual estoppel argument. The Court of Appeal stressed that there was a two stage process (at [57]) of determining (i) what the terms of the contract were (in which the intentions of the parties would be relevant) and then (ii) discovering what the effect of a clause is for the purpose of s.3 (at that juncture the intention of the parties would be of dubious relevance). The Court of Appeal concluded (at [67]) that a clause which simply states that a document has not been entered into in reliance upon a particular statement would be a contract term which would have the effect of excluding liability for misrepresentation and therefore be subject to the requirement of reasonableness. Clause 5.8 of the contract was covered by s.3 MA 1967.

39. In his concurring judgment Leggatt LJ also reviewed the so-called "estoppel" clauses in the context of "non-reliance" provisions. However he queried whether merely "acknowledgements" that there had been no reliance on representations, amounted to an agreement or an intention to agree that no claim would be made for misrepresentation. His review of "basis" clauses went further in saying that there was essentially to be no difference in the distinction between clauses which prevent a liability from arising and those which exclude liability, because the question was to be approach by the courts as one of effect rather than drafting style (at [96-97]). Leggatt LJ refused to allow the purpose of s.3 of MA 1967 to be defeated by drafting saying, "[N]*o rational legislator could have intended that the need for a contract term to satisfy a test of reasonableness could be avoided simply by felicity in drafting the contract term*." Leggatt LJ also made clear that the effect of a term (and therefore whether it was caught by s.3) would not depend on the status of a party as a "man in the street" or large commercial party (which would fall to be relevant for the reasonableness inquiry under s.11 UCTA). Distinguishing between whether s.3 MA applied according to the status of the parties would run contrary to the scheme of UCTA and to s.3 MA itself. It was the job of the court to uphold the policy choice of Parliament to subject all clauses which purported to take away the right that parties had to rely upon misrepresentation as a vitiating factor to a test of fairness and reasonableness (at [104-105]). Leggatt LJ's judgment is also interesting for the focus it gives to the prospective or retrospective effect of a clause which purports to have the effect regulated by s.3 and the structure and process of the enquiry that should be undertaken according to whether that clause is prospective or retrospective.

40. In assessing the "reasonableness" of Clause 5.8 the Court of Appeal recognised that there might be some force in the Claimant's argument that this was a contract drafted by professional solicitors in which the parties could have protected themselves by drafting a "carve out" to mitigate the unfairness of the clauses to allow the Defendant to rely upon the enquiries received from the Claimant. However ultimately the Court of Appeal took a fairly light-touch approach to the "reasonableness review" stating that since the judge had directed himself to the correct law, analysed the correct features of the case and considered the correct factors, his decision would stand. The appeal court was also convinced that the judge had been right to consider the importance of conveyancing enquiries (and the damage done to those enquiries if Clause 5.8 governed the landlord's liability). Indeed the Court of Appeal found it "very hard" to consider a case where a clause which precluded reliance on replies to enquiries would satisfy the requirement of reasonableness.

41. The final issue (at [78-87]) was whether the Claimant was entitled to limit any liability under MR 1967 to its capacity as trustees rather than incurring personal liability. As the Privy Council made clear in *Investec Trust (Guernsey) Ltd v Glenella Properties Ltd* [2018] 2 WLR 1465 at [59] the legal personality of a trustee is unitary and therefore there is no distinction to be drawn between the personal and fiduciary capacity of a trustee for the consequences of breaches of those duties. Although the trustee can limit his liability by contract, the mere fact of contracting as a trustee will not be sufficient for this purpose, there must be words "negativing the personal

liability" before the contract will have the effect of limiting the trustee's personal liability. In *First Towers* the Claimants argued that their personal liability for misrepresentation (including pre-contractual representations) were excluded by the words of the contract, and therefore the contract was effective to cover all liabilities (even statutory liabilities based on pre-contractual representations).

42. The Court of Appeal disagreed (at [84-86]). Ultimately it was a matter of contract as to what liability a trustee has excluded by contract, and whilst this can cover statutory liabilities, the mere fact of a contract would not be sufficient to enable the contractual exclusion to cover non-contractual liabilities under tort or statute. The Court of Appeal stressed that there were good reasons why a party might exclude contractual liability for misrepresentation but not cover statutory liability for misrepresentation. It would be wrong and contrary to the general principle that the law does not in the absence of clear words presume that a party is giving up rights the law would otherwise confer, to assume that s.2 MA liabilities were covered by the contractual limitation in this case.

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