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Recent English cases reaffirm certainty in contractual interpretation

Introduction

English law has long been valued by parties for its virtues of certainty and predictability, both at home and abroad. Writing extrajudicially, Sir Kim Lewison, a current Lord Justice of Appeal, observed that ‘[t]he promotion of certainty is a theme that has run through English commercial law for centuries’.¹ In large part, this has been the mainstay of the success of English law as a preferred choice of governing law for many international contracts and transactions.

Modern judicial approval of legal and commercial certainty rings through the English law reports of the highest appellate courts. In *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)*,² for instance, Lord Bingham stated that ‘[t]he importance of certainty and predictability

in commercial transactions has been a constant theme of English commercial law’.³ More recently, in *JTI POLSKA Sp Z o o and Others v Jakubowski and Others*,⁴ Lord Hamblen reiterated that ‘[c]ertainty and predictability are of particular importance in the context of English commercial law, all the more so given the frequent choice of English law as the governing law in international commercial transactions’.⁵

The importance given to the notion of certainty underlies the English Courts’ objective approach to the interpretation of contracts. In *President of India v Jebsens (UK) Ltd (The General Capinpin, The Proteus, The Free Wave and The Dinera)*,⁶ Lord Goff observed that ‘the objective interpretation is of paramount importance in commercial affairs’, noting that commercial people should be able to rely on tribunals to

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‘adopt the same objective approach as they themselves have to adopt in the daily administration of their contracts’ if a dispute arises.⁷ Similarly, in *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd*,⁸ Colman J emphasised that ‘[t]he whole basis of contractual certainty is the words actually used in their ordinary meaning’ and that ‘[d]eparture from the ordinary meaning cannot normally be justified merely because another construction would have produced a result more reasonable in commercial terms for both parties’.⁹

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The high point of the promotion of certainty in the interpretation of contracts was probably the well-known case *Arnold v Britton and Others*, which concerned the interpretation of a provision in the lease for the yearly increase of a fixed annual service charge on a compound basis. In upholding the natural and ordinary meaning of this provision in the landlord’s favour, the Court of Appeal took the view that the provision ‘has a similarity with a liquidated damages clause’, and that ‘the advantage is certainty’ because ‘[t]he parties know from the outset where they stand’.¹⁰ The United Kingdom Supreme Court endorsed the Court of Appeal’s reasoning and dismissed the appeal,¹¹ stressing that ‘the reliance placed in some cases on commercial common sense and surrounding circumstances [...] should not be invoked to undervalue the importance of the language of the provision which is to be construed’.¹²

Although the Supreme Court has since advocated a more nuanced approach and pointed out that ‘[t]extualism and contextualism are not conflicting paradigms’ but instead complementary ‘tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement’, the extent of their helpfulness varying in each particular case,¹³ a number of recent cases in 2024 serve to demonstrate that the English courts’ approach is still very emphatically focused on the express language of the contract and the importance of certainty, while at the same time giving effect to the wider policy considerations in play.

Force majeure clauses: *RTI Ltd v MUR Shipping BV*

The first notable case of 2024 (and one that has been widely discussed) is the UK Supreme Court’s decision in *RTI Ltd v MUR Shipping BV*,¹⁴ which was a contractual dispute over a force majeure clause in a charterparty for the continuous bulk carriage of bauxite shipments from Guinea to Ukraine. As a result of United States sanctions, the charterer was unable to make timely payments in US dollars, and the shipowner gave a force majeure notice and suspended performance. The Supreme Court therefore had to consider whether the proviso in the force majeure clause that the event ‘cannot be overcome by reasonable endeavours from the Party affected’ meant that the shipowner should have accepted payment in some other currency.

Lord Hamblen and Lord Burrows began their judgment by summarising the key principles militating in favour of the shipowner’s case, including the principle that ‘freedom not to contract includes freedom not to accept the offer of a non-contractual performance of the contract’,¹⁵ and ‘[t]he need for clear words to be used for there to be any contractually required change to the parties’ rights’.¹⁶ Above all, they reiterated the importance of certainty in commercial contracts (citing *JTI Polska*),¹⁷ and pointed out that ‘[i]t is not unmeritorious or unjust to insist on contractual performance, all the more so if being precluded from doing so would introduce uncertainty contrary to the expectations of reasonable business people’.¹⁸

With the above principles in mind, the Supreme Court unanimously held that the ‘reasonable endeavours’ provision did not operate to require the shipowner to accept non-contractual performance, and that such a provision was only ‘geared towards achieving contractual performance: it is concerned with reasonable efforts to overcome the sanctions by achieving payment in US dollars’.¹⁹ This is the clearest and most direct expression of the continuing importance of promoting certainty and predictability in the parties’ contractual bargain, and it will be seen that this is also a running theme in the other cases discussed below.

Construction adjudication under collateral warranties: *Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP*

One of the most highly anticipated decisions in 2024 in the field of construction law was the UK Supreme Court's judgment in *Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP*,²⁰ which considered whether a collateral warranty executed some four years after practical completion and eight months after all defect rectification works had been completed by another contractor could nonetheless be construed as a 'construction contract' under section 104 of the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA'), such that the statutory adjudication provisions would apply.

At first instance, Deputy High Court Judge Martin Bowdery KC held that the collateral warranty in question was not a 'construction contract' in the circumstances, for 'where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate'.²¹ This was reversed by a majority of the Court of Appeal (with Stuart-Smith LJ dissenting) on the basis that the wording of the collateral warranty was 'warranting that, not only have they carried out the construction operations in accordance with the building contract, but they will continue so to carry out the construction operations in the future'.²² It is noteworthy that, in reaching this conclusion, Coulson LJ considered that any other result would be 'counter-intuitive' and 'unsatisfactory' because it 'would make for considerable uncertainty' to have a warranty construed as a 'construction contract' (or not) depending on whether a contractor executes the warranty before or after completion.²³

Given the divergence of judicial opinions on this issue, it is perhaps unsurprising that the UK Supreme Court ultimately took a different view and unanimously overruled the Court of Appeal's decision. Lord Hamblen approached the issue essentially as a question of interpretation of the wording in the HGCRA and warranty. Fundamentally, Lord Hamblen disagreed that the reference to an agreement 'for [...] the carrying out of construction operations' under section 104(1) of the HGCRA can be read as synonymous with an agreement 'in respect of' construction operations; rather, the

natural and ordinary meaning of the word 'for' indicated that the question is 'whether the object or purpose of the agreement is the carrying out of construction operations'.²⁴

Based on the above reasoning, Lord Hamblen observed generally that 'it is difficult to see how the object or purpose of a collateral warranty is the carrying out of construction operations' because the 'main object or purpose of such a warranty is to afford a right of action in respect of defectively carried out construction work, not the carrying out of such work'. It follows that the collateral warranty in question was not a 'construction agreement' for the purposes of the HGCRA.²⁵

It is interesting that both Coulson LJ in the Court of Appeal and Lord Hamblen in the Supreme Court invoked the notion of 'certainty' but ended up reaching diametrically opposite conclusions.

Notably, Lord Hamblen's conclusion was very much driven by what he perceived to be 'in the interests of certainty', namely that 'there is a dividing line which means that collateral warranties are generally outside the 1996 Act rather than everything being dependent on the wording of the particular collateral warranty in issue', and he considered that this would 'assist those in the construction industry, and those advising them, to know where they stand'. This is the clearest possible example of the importance attached by English Courts to legal/commercial certainty when dealing with problems of contractual interpretation.

It is interesting that both Coulson LJ in the Court of Appeal and Lord Hamblen in the Supreme Court invoked the notion of 'certainty' but ended up reaching diametrically opposite conclusions. It is clear that certainty was only one part of the equation and that policy was another key factor, whereas Coulson LJ was heavily influenced by what he considered to be 'the intended purpose of the 1996 Act' of achieving 'the availability of a swift and inexpensive adjudication procedure' to all parties in a construction project.²⁶ Lord Hamblen was of the view that this policy 'does not assist in interpreting how it has drawn the boundaries of section 104(1)'.²⁷ In the end, it was the policy of 'certainty' that emerged triumphant. For Lord Hamblen, it was preferable to avoid 'fine distinctions being drawn and to disputes in

relation both to the drafting of collateral warranties and to their proper interpretation', and to leave it to the parties to voluntarily and expressly opt into adjudication under a warranty if desired.²⁸

In practice, what is seen as certain by one may be considered as uncertain by another, and there is not necessarily a bright-line distinction between the principle of certainty on the one hand and interests of policy/justice on the other. Put another way, the consideration of which outcome produces the greatest certainty is, almost inevitably, informed per se by other considerations of underlying policy objectives and the practical consequences. Nevertheless, the overarching policy that is of paramount importance is that of enabling commercial men to predict the legal outcome on a principled basis and arrange their affairs accordingly.

Termination clauses: *Providence Building Services Ltd v Hexagon Housing Association Ltd*

After *Abbey Healthcare*, the English Court of Appeal was faced with another bitter contest between parties for what they each consider to be commercial certainty, this time in the context of the contractual termination provisions under an amended JCT Design and Build Contract 2016 in *Providence Building Services Ltd v Hexagon Housing Association Ltd*.²⁹

The dispute arose from an attempt by the contractor ('Providence') to terminate the contract upon a repetition of a specified default, that being repeated failures by the employer ('Hexagon') to pay the 'notified sum' that had contractually fallen due in respect of interim payments. In December 2022, Providence issued a default notice under clause 8.9.1 of the contract in respect of Hexagon's failure to pay the notified sum by the final date for payment, but this sum was eventually paid before the 28-day cure period under clause 8.9.3 had expired. In May 2023, however, Hexagon failed to pay another notified sum by the final date for payment, which led Providence to give notice to Hexagon to terminate the contract under clause 8.9.4. The issue was whether Providence was entitled to rely on clause 8.9.4 to terminate the contract for a repeated default.

Clause 8.9.4 provided for a right to terminate the contract for a repetition of a specified default '[i]f the Contractor for any

reason does not give the further notice referred to in clause 8.9.3'. At first instance, Deputy High Court Judge Adrian Williamson KC rejected Providence's contentions and held that 'clause 8.9.4 requires that a clause 8.9.3 notice could have been given but the Contractor has decided not to do so for whatever reason', but does not envisage a right to give a clause 8.9.4 notice in circumstances where the right to give a clause 8.9.3 notice has never arisen.³⁰

The Court of Appeal, however, took a very different view and reached the opposite conclusion. Stuart-Smith LJ started by emphasising that, for a standard form contract, 'the process of interpretation will ultimately depend upon an intense focus on the words used'.³¹ On that approach, Stuart-Smith LJ considered that the language of clause 8.9.4 was 'clear' and 'broad enough to cover any state of affairs other than one where the Contractor does give notice', such that 'the natural meaning of the words in Clause 8.9.4 viewed on their own does not give rise to an inference or an implication that the Contractor could have given a further notice but did not do so'.³² This was further reinforced if one construes the related provisions under the structurally similar clause 8.4 that governed termination for a contractor's default: although clause 8.4.3 did not use the words 'for any reason', it nonetheless provided for the right to terminate for a repeated default if no termination notice was previously given for a specified default 'whether as a result of the ending of any specified default or otherwise', which is similarly broad.³³

It is worth noting that 'certainty' again played an important part in this case: counsel for Providence emphasised that 'Providence's interpretation has the advantage of certainty, without which the Parties would be left with the time- (and money-)consuming uncertainties of alleging and proving repudiatory conduct',³⁴ and Stuart-Smith LJ observed that despite there being other potential remedies for non-payment, 'none provides a satisfactory and immediate solution to the typical case of late payment: each involves a measure of delay and, in the case of suspension or resorting to adjudication, additional cost and uncertainty for the contractor in pursuing them'.³⁵

The Court of Appeal's decision in *Providence Building* is therefore another recent example of the importance attached

by the English courts to legal and commercial certainty, both in terms of the primacy of the natural and ordinary meaning of the contractual language and the practical outcome produced by the interpretation (here, the ability to resort to termination as a remedy for repeated non-payment, which reduces cost and uncertainty of a protracted dispute). Above all, it is also a good illustration of how the principle of certainty is intimately linked to other underlying policy considerations such as the protection of cashflow and the promotion of efficient resolution of disputes. The UK Supreme Court has just granted permission to appeal, and so it will be interesting to see if the balance struck by the Court of Appeal will withstand scrutiny.

Payment provisions in construction contracts: *Morganstone Ltd v Birkemp Ltd*

A typical issue in a building or engineering contract is ambiguities/inconsistencies in the parties' interim payment mechanism, and the English courts are frequently asked to make certain what may at first sight seem to be uncertain. The recent decision of the English High Court in *Morganstone Ltd v Birkemp Ltd* is one such case,³⁶ which raised the question of whether a subcontractor had a continuing entitlement to interim payments after the dates contained in a payment schedule ran out.

The subcontract in question contained a payment schedule setting out the dates on which each interim application was to be made, and this schedule originally contained payment application dates up to 28 February 2022. This was later updated by the parties to cover payment applications for the rest of 2022, but no further payment application dates were ever agreed for 2023.

The above facts were reminiscent at first sight of the English Court of Appeal decision of *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*.³⁷ However, there is a crucial difference in *Morganstone v Birkemp*: clause 10 of the subcontract contained a detailed payment mechanism by which the default payment application dates, due dates and final dates for payment could be calculated. The payment schedule dates were a bespoke amendment to clause 10 by virtue of a manuscript amendment alongside

clause 10 that stated 'PAYMENT SCHEDULE TAKES PRECEDENCE' in red ink.

The matter came before HHJ Keyser KC as a claim for declarations under CPR Part 8.³⁸ The judge cited the well-known authorities on the objective approach to contractual interpretation (including *Arnold v Britton* and *Wood v Capita*), and then noted that *Balfour Beatty* was 'a case that turned on the precise terms of the parties' agreement', and that '[t]he question before [him] concerns the extent and limits of the agreement between Morganstone and Birkemp'.³⁹ The focus was therefore on the particular provisions adopted by the parties in question, and very much with a view to preserving the commercial certainty of the parties' bargain.

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In *Balfour Beatty*, the payment mechanism was defined solely by reference to the payment schedule dates, such that the Court of Appeal could not accept that the relevant payment dates could be implied or otherwise left open for a tribunal to determine post-contract, as '[b]oth parties needed to know with certainty what were the applicable dates'.⁴⁰ In other words, the need for certainty militated in favour of refusing to go beyond the agreed payment schedule on that particular set of facts.

By contrast, clause 10 of the subcontract in *Morganstone v Birkemp* provided a fully workable payment mechanism. That mechanism was subject only to the manuscript amendment, which HHJ Keyser KC construed as meaning that 'in the case of conflict between the monthly payment schedule and clause 10 [...] the monthly payment schedule would take precedence', but 'once the schedule and any further agreed schedule ended, there was nothing to displace the timetable provided by clause 10'.⁴¹

Unlike in *Balfour Beatty*, therefore, the court in *Morganstone v Birkemp* could give effect to the natural and ordinary meaning of clause 10 and provide legal and commercial certainty to the parties as to the subcontractor's right to apply for interim payments. Again, this is not only an expression of the English courts' constant search for certainty in parties' transactions,

but also intrinsically linked to other substantive policy considerations, such as the preservation of contractors' cashflow and interim payment entitlements.

Conclusion

The recent case law on contractual interpretation considered above shows the English courts' continuing emphasis on the notion of certainty in giving effect to parties' contractual bargains and also any applicable statutory regime. This is primarily achieved by focusing in the first instance on the natural and ordinary meaning of the language used in the relevant contract/statute.

That is not to say, however, that the commercial context/purpose of the contract in question is irrelevant, as one can see from the English courts' reasoning in the cases above. Nevertheless, it is clear that the policy considerations that the English courts give weight to tend to go hand in hand with the notion of certainty, be it protecting a party's cashflow/financial expectations or ensuring that parties know their rights and remedies in advance. These factors should all be borne in mind by any practitioner advising a party on a contractual dispute involving a question of interpretation under English law.

Notes

- 1 Lewison K, *The Interpretation of Contracts*, (8th edn, London, 2024), [2.26].
- 2 [2007] 2 AC 353 (UK House of Lords).
- 3 See n 2 above, [23], citing *Vallejo v Wheeler* (1774) 1 Cowp 143, 153 (Court of King's Bench, Chancery and Common Pleas in England and Wales); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694, 703–704 (UK House of Lords); *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715, 738 (UK House of Lords); and *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2005] 1 WLR 1363, 1370 (UK House of Lords).
- 4 [2024] AC 621 (UK Supreme Court).
- 5 See n 4 above, [39].
- 6 [1991] 1 Lloyd's Rep 1 (UK House of Lords).
- 7 See n 6 above, p 9.
- 8 [2005] 1 Lloyd's Rep 307 (High Court of England and Wales).
- 9 See n 8 above, p 321.
- 10 [2013] EWCA Civ 902 (Court of Appeal of England and Wales), [52] (Davis LJ).
- 11 [2015] AC 1619 (UK Supreme Court), [24]–[27] (Lord Neuberger).

- 12 See n 22 above, [17] (Lord Neuberger).
- 13 *Wood v Capita Insurance Services Ltd* [2017] AC 1173 (UK Supreme Court), [13] (Lord Hodge).
- 14 [2024] Bus LR 1492 (UK Supreme Court).
- 15 See n 14 above, [42].
- 16 See n 14 above, [46].
- 17 See n 14 above, [47].
- 18 See n 14 above, [58].
- 19 See n 14 above, [57].
- 20 [2024] Bus LR 1263 (UK Supreme Court).
- 21 [2021] Bus LR 1357 (High Court of England and Wales), [26]–[27].
- 22 [2022] Bus LR 1079 (Court of Appeal of England and Wales), [62] (Coulson LJ).
- 23 See n 22 above, [74] (Coulson LJ).
- 24 See n 20 above, [62]–[64].
- 25 See n 20 above, [65] and [72].
- 26 See n 22 above, [41].
- 27 See n 20 above, [61].
- 28 See n 20 above, [75] and [78].
- 29 [2024] EWCA Civ 962 (Court of Appeal of England and Wales).
- 30 [2023] EWHC 2965 (TCC) (High Court of England and Wales), [19].
- 31 See n 30 above, [25].
- 32 See n 30 above, [29].
- 33 See n 30 above, [32]–[33].
- 34 See n 30 above, [20].
- 35 See n 30 above, [43].
- 36 [2024] EWHC 933 (TCC) (English High Court).
- 37 [2017] BLR 1 (English Court of Appeal).
- 38 CPR pt 8 is a simplified procedure under the English rules of civil procedure which allows a party to expeditiously seek the court's decision on a question which is unlikely to involve a substantial dispute of fact; such claims typically involve no disclosure and no or limited factual witness evidence, with a hearing for oral legal submissions lasting one to two days.
- 39 See n 36 above, [36].
- 40 See n 37 above, [37] (Jackson LJ).
- 41 See n 36 above, [37].

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