

Contract Caselaw Update

30 September 2021



Monsolar IQ Ltd v Woden Park Ltd ***[2021] EWCA Civ 961 (Drafting Mistakes)***

- 25.5 Year Lease for Solar Farm
- Annual Review Clause
- Previous Year's Rent x (RPI May Current Year/RPI May 2013)
- 83.1% increase in rent over 7 years.
- Estimated £76 million p.a. after 25 years per historic trends.
- Drafting corrected as a matter of construction by Fancourt J at first instance.

Monsolar IQ Ltd v Woden Park Ltd ***[2021] EWCA Civ 961 (Drafting Mistakes)***

- Principle in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1011.
- No qualification of that principle in *Arnold v Britton* [2015] UKSC 36.
- Distinction between 'commercially unattractive and unreasonable' and 'nonsensical or absurd'.
- Two (unsuccessful) appeal grounds: 1) No mistake & 2) No clear method of correction.
- Intended purpose clear; exponential results were irrational nonsense; and clear why mistake occurred.
- Not clear upwards only rent review intended. To provide for that would be to correct a different mistake of a different character.

Harcus Sinclair LLP v Your Lawyers Ltd ***[2021] 3 WLR 598 (Restraint of Trade)***

- Solicitor firms entered non-disclosure agreement (“**NDA**”) in advance of provision of confidential information for purposes of legal advice in respect of proposed group litigation.
- NDAs contained a non-compete undertaking. Harcus Sinclair would not accept instructions in emissions group litigation without Your Lawyers’ written permission for a period lasting six years.
- Harcus Sinclair recruited claimants and commenced group litigation and sought declaratory relief.
- Defendant wins at first instance, but CA allowed appeal on basis undertaking constituted an unreasonable restraint of trade and that the supervisory jurisdiction over solicitor undertakings did not extend to LLPs.

Harcus Sinclair LLP v Your Lawyers Ltd **[2021] 3 WLR 598 (Restraint of Trade)**

- Test for reasonableness: (1) Does the clause protect promisee's legitimate interests? (2) Does it go no further than reasonably necessary? (3) Is it commensurate with promisor's benefits? (4) Contrary to public policy?
- Could court consider not only the terms of the NDA but the non-contractual intentions or what the parties contemplated would occur?
- No objection in principle, wide ambit of interests, advent of factual matrix analysis, and unilateral nature of NDA supported such consideration.
- Six years was logical and necessary as it linked to the limitation period and restriction was only on one type of litigation. Further, restriction was commensurate to benefits.
- Helpful general observations on reasonableness.
- Clause not unreasonable as against public policy.
- Clause not a solicitor undertaking. Obiter comments on solicitors' undertakings.

Dargamo Holdings Ltd & Anor v Avonwick Holdings Limited & Ors [2021] EWCA Civ 1149 (Failure of consideration)

- Four signposts of a claim in unjust enrichment.
- Dargamo decision focuses on unjust factors, specifically failure of consideration.
- Dargamo and Azitio combined to purchase Castlerose.
- Common ground that USD950m transferred under SPA included payment for two other companies NET and Agro. But no mention in SPA, no other completed document.
- Azitio received interests in NET and Agro but Dargamo did not.
- Dargamo and Mr Taruta appeal on unjust enrichment. Argument is failure to transfer interests in Net and Agro constituted a total failure of consideration.

Dargamo Holdings Ltd & Anor v Avonwick Holdings Limited & Ors [2021] EWCA Civ 1149 (Failure of consideration)

- Interplay between contract liability and unjust enrichment.
- Highlighting of 'Obligation Rule' and complementary role of unjust enrichment.
- Adoption of 'failure of basis' terminology.
- Doctrine of apportionment ameliorates totality requirement.
- On facts, SPA expressly designated USD950m as payment for Castlerose shares alone.
- Appellant's argument was an extreme attempt to override express terms of a valid contractual agreement.

Key Takeaways

- Correction by construction
 - Check your drafting.
 - Tightly controlled and fine line between commercially unreasonable and non-sensical/irrational.
 - Rectification alternative?
- Restraints of Trade
 - Identify protected interest?
 - Bargaining power
 - Inclusion in NDAs
- Failure of Consideration
 - Consider contract validity.
 - Look at wider context.
 - Ask whether bargain can be apportioned.
 - Drafting warning

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