Case No: HT-2020-000157

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
[2021] EWHC 754 (TCC)

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 30th March 2021

Before:

HH JUDGE EYRE QC

- -

Between:

MOTT MACDONALD LTD	**Claimant**
- and -	
TRANT ENGINEERING LTD	**Defendant**

- -
- -

Simon Hale (instructed by **Clyde & Co LLP**) for the **Claimant**
Lord Marks QC and Daniel Goodkin (instructed by **KT Construction Law Ltd**) for the **Defendant**

Hearing date: 4th March 2021

- -

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 30th March 2021 at 10:30am"**

.....

HH JUDGE EYRE QC

HH Judge Eyre QC:

Introduction.

1. On 20th November 2017 the Claimant and the Defendant entered the Settlement and Services Agreement ("the SSA"). Under the SSA the Claimant was to provide services in respect of the work being undertaken by the Defendant in connexion with the upgrading of facilities at the military base at RAF Mount Pleasant in the Falkland Islands. The SSA contained clauses limiting and excluding the liability which the Claimant would otherwise have to the Defendant in the event of a breach of the SSA.

2. A dispute has arisen in which the Claimant contends that payment is outstanding to it under the SSA and in which the Defendant contends that it has a substantial counterclaim arising out of the Claimant's alleged breaches of that agreement. The Defendant alleges that the Claimant committed those breaches "fundamentally, deliberately, and wilfully". The Claimant denies breaching the SSA and in particular that it did so fundamentally, wilfully, or deliberately but contends that in any event the claim set out in the counterclaim is subject to the restrictions and exclusions contained in the SSA. The Defendant disputes this asserting that those provisions do not operate to exclude or restrict the Claimant's liability for breaches committed fundamentally, wilfully, or deliberately. The Claimant has applied for summary judgment on the issue of whether such breaches fall within the scope of the clauses limiting and restricting liability.

The Context and Terms of the SSA.

3. The Claimant is an engineering consultancy and the Defendant is an engineering contractor. In 2016 the Defendant was engaged by the Defence Infrastructure Organisation ("the DIO"), an operating arm of the Ministry of Defence, to construct a new power station at RAF Mount Pleasant ("the Project"). The Project was a £55m exercise involving the provision of a new power generation facility; the modification and automation of the existing standby power generation facility; and the replacement of the existing boiler plant and the main MTHW distribution system. The Defendant had engaged the Claimant to provide initial design consultancy services during the tender period. After the Defendant had obtained the contract from the DIO there were further exchanges between the parties. However, a dispute rapidly developed. The parties were at odds as to whether there was a concluded contract between them; as to the scope of the works which the Claimant was being engaged to perform; as to the value of the services provided and the amount to be paid for them; and as to whether (if there was a contract) either party was in repudiatory breach and, if so, the consequences of that for the Defendant's entitlement to retain design data produced by the Claimant. On 5th July 2017 the Defendant commenced proceedings and obtained an interim injunction from O'Farrell J (from whose judgment at [2017] EWHC 2061 (TCC) the bulk of this background summary is taken).

4. The SSA was entered on 20th November 2017 with a view to resolving the existing dispute and governing the parties' future actions.

5. The SSA provided for the termination of the earlier proceedings by way of a consent order and, at clause 9, the parties agreed that save as was set out in Appendix 3 the SSA was to be in full and final settlement of all prior claims.

6. The SSA contained provisions setting out the basis on which payment was to be made to the Claimant and I will address below the submissions made by Lord Marks QC for the Defendant as to the relevance of the payment provisions to the construction of the clauses currently in question.

7. Appendix 2 set out the Scope of Services to be delivered under the SSA. In very bald summary the Claimant was to deliver the design deliverables listed in the Master Deliverables Schedule; to integrate the detailed design for packages prepared by the Defendant's third-party suppliers into the overall design of the Project; to integrate its own design with the existing equipment and structures; to use information provided by the Defendant to build a BIM (building information modelling) model for those new build items associated with the Project; and to undertake design risk assessments.

8. Although the Claimant was to provide the design deliverables listed in the Master Deliverables Schedule that Schedule had not been finalised at the time of the signing of the SSA. The effect of that was addressed in clause 5A of the SSA in these terms:

> "The Parties acknowledge that there has been insufficient time as at the date of execution of this Agreement for the Client to verify the proposed Master Deliverables Schedule, a draft of which was circulated by the Consultant's solicitors to the Client's solicitors on 14 November 2017 ("the Draft Master Deliverables Schedule"). In the interests of the Agreement being executed and implemented as soon as possible, the Parties agree that:
>
> a. During the period of 14 days immediately following execution of the Agreement, they shall use their reasonable endeavours in good faith to agree any additions or omissions to the Draft Master Deliverables Schedule required of this Agreement. Following this 14 day period, the Draft Master Deliverables Schedule, as so revised, shall constitute the Master Deliverables Schedule as that term is defined in the Scope of Services for the term of this Agreement.
>
> b. To the extent that the Draft Master Deliverables Schedule is revised during the 14 day period referred to in this clause, such revisions shall not constitute Additional Services."

9. Lord Marks drew my attention to the parties' acknowledgement in that clause that there had been insufficient time to finalise the Master Deliverables Schedule notwithstanding the crucial importance which that document had in the operation of the SSA. As I will explain below Lord Marks criticised the quality of the drafting of the SSA and invited me to take account of that acknowledged insufficiency of time when considering the extent to which the wording of the clauses currently in issue should be relied upon as properly or adequately articulating the parties' intentions. It is to that wording that I now turn.

10. Appendix 3 set out the Terms and Conditions of the SSA and comprised four schedules dealing respectively with the conditions, the timetable, the personnel, equipment, and facilities to be provided by the Defendant, and with the terms of payment.

11. The Conditions were in Schedule 1. Clause 1.2 thereof set out the Claimant's obligations and provided for the Claimant to perform the Services under the SSA together with Additional Services agreed upon in accordance with the terms of the

SSA. Clause 1.2.2 set out the Claimant's duty of care in commonplace terms and that was expanded upon in clause 1.2.3.

12. Clause 1.4 of the Schedule addressed liability and it is on this provision that the current application turns. Under the heading "liability and indemnity" 1.4.1 (i) – (iii) provided that:

> "i) Without prejudice to the Client's rights to pay less pursuant to clause 1.8.1. the Consultant shall only be liable to pay compensation to the Client under or in connection with the Agreement if a breach of the Agreement is established against the Consultant.
>
> ii) Notwithstanding any other term to the contrary in the Agreement or any related document and whether the cause of action for any claim arises under or in connection with the Agreement in contract or in tort, in negligence or for breach of statutory duty or otherwise. in relation to any and all causes of action as aforesaid:
>
> a. the total liability of the Consultant in the aggregate for all claims shall be limited to £500,000 (Five hundred thousand Pounds), and
>
> b. the Consultant shall have no liability whatsoever for any loss to the Client under the Agreement:
>
> a) for the Previous Design Services save in respect of any mechanical and electrical engineering services that formed part of the Previous Design Services;
> b) to the extent that the Client is unable to prove that the Consultant's breach was solely responsible in full for such loss:
> c) for any delay to or late completion of the Project occurring prior to the date of the Agreement arising out of any delay in the period prior to the date of the Agreement;
> d) for any liquidated damages payable by the Client in relation to the Project; and
> e) for indirect, special or consequential loss (including but not limited to loss of profit whether direct or indirect, loss of production, loss of contracts, loss of use, loss of business, and loss of business opportunity).
>
> iii) Further and without prejudice to the aforesaid limits and exclusions of liability any such liability of the Consultant for any loss or damage ("the loss or damage") in respect of any claim or claims shall be limited to such sum or sums as it would be just and equitable for the Consultant to pay having regard to the Consultant's responsibility for the same and on the basis that:
>
> a) all other parties appointed or to be appointed by the Client to perform related services in connection with the Project shall be deemed to have provided undertakings on terms no less onerous than the Agreement and shall be deemed to have paid to the Client such contribution as it would be just and equitable for them to pay having regard to their responsibility for the loss or damage; and
>
> b) it shall be deemed that all such other parties have not limited or excluded their liability to the Client for the loss or damage in any way which may be prejudicial to the Consultant's liability under this clause."

13. Thus there are three relevant clauses: the liability cap at clause 1.4.1 ii) a; the exclusions clause at clause 1.4.1 ii) b; and the net contribution clause at clause 1.4.1 iii). Those are the clauses on which the Claimant relies in response to the Defendant's counterclaim and which the Defendant contends do not apply to fundamental, wilful, or deliberate breaches. It is, however, important to note that they are only part of

clause 1.4.1 the balance of which contained the following exclusions and limitations on liability together with, at (vii), a restriction of the scope of clause 1.4.1 thus:

> "iv) Further and without prejudice to the foregoing the total liability of the Consultant under or in connection with the Agreement for any and all claims in respect of contamination or pollution shall be limited to the lesser of
>
> a) £250,000 (Two hundred and Fifty Thousand Pounds), or
>
> b) the direct cost incurred by the Client in removing the contamination or pollution
>
> v) The Consultant shall have no liability to the Client in respect of any claim for loss or damage arising from acts of war or terrorism, nuclear or radioactive emissions, any incidence of toxic mould, or from or related to asbestos.
>
> vi) No action or proceedings under or in connection with the Agreement shall be commenced against the Consultant after the expiry of 6 (six) years from completion of the Services.
>
> vii) Nothing in this clause shall operate to exclude or limit the Consultant's liability for death or personal injury."

14. It is common ground that there was a meeting between representatives of the Claimant and the Defendant on 28th June 2018. The Claimant says that the parties reached a further agreement at that meeting. The Claimant calls this the Interim Fee Agreement and says that it was an agreement for the Defendant to pay the Claimant compensation for being on standby during periods of delay not caused by the Claimant. The Defendant says that the arrangement was wholly different and was neither a binding contract nor a variation of the SSA but rather an *ex gratia* arrangement whereby the Defendant was to make payments on account in respect of the Claimant's fees for Additional Services under the SSA. Nothing turns on that issue for the purposes of the current summary judgment application.

The Proceedings.

15. The Claimant commenced these proceedings in April 2020 seeking an award of £1,793, 245.66 made up of: £600,000 said to be due as the Completion Payment under the SSA; £1,007,229.98 as Variation Payments under the SSA; and £186,015.68 allegedly due under the Interim Fee Agreement.

16. The Defence and Counterclaim was served on 24th July 2020. In his evidence in response to the current application Mr. Mould exhibited a "draft proposed Amended Defence and Counterclaim" and said that the document was a "preliminary draft" of an amendment which the Defendant would seek to make. I will proceed on the basis of the Defendant's case as set out in that draft statement of case. Permission has neither been given nor sought for that amendment but the potential amendments amount to an expansion of the allegations which are relevant for current purposes rather than the introduction of a new basis of defence or counterclaim.

17. The Defendant contends that the Claimant "fundamentally, deliberately, and wilfully breached its obligations under the SSA". Thus at [2] the Defence and Counterclaim says that the breaches consisted of refusals by the Claimant to complete the required design deliverables; to provide the native data files and detailed calculations that the Claimant had created; and to carry out independent reviews of its design. At [4] it is said that because of the Claimant's breaches the Defendant has "had to redo virtually

the entire scope of work under the SSA". The alleged breaches are set out in more detail at [87] and [88] and then, at [90], it is averred that the Claimant refused to perform in order deliberately to harm the Defendant or to "exert improper commercial pressure in relation to its demands for payments of invoices to which it was not entitled". Lord Marks correctly summarised the Defendant's position as being that the Claimant had positively and deliberately refused to perform its obligations and had done so in order to put improper pressure on the Defendant to pay sums which were not due to the Claimant. The allegations were repeated in the Counterclaim where the Defendant is alleged to have suffered an estimated loss of £5,066, 812 as a consequence of having to "correct, complete, and redo much of the design work [the Claimant] purported to carry out". In addition the Defendant seeks repayment of the difference between payments made on account to the Claimant and the sums to which the Claimant is in fact entitled together with indemnification in respect of such claims as either the DIO or the Defendant's suppliers or sub-contractors might in due course bring against the Defendant for breaches resulting from the Claimant's breaches of the SSA.

18. In the Reply and Defence to Counterclaim the Claimant denies the alleged breaches. It contends that as a matter of law and of construction of the SSA even if the breaches were to be established and were found to have been fundamental, wilful, or deliberate the exclusion and limitation clauses in the SSA would nonetheless operate to exclude or limit the Claimant's liability.

19. On 28th January 2021 the Claimant sought summary judgment on three issues. These were the applicability of the clauses at Appendix 3 Schedule 1 1.4.1 (ii)(a), (ii)(b), and (iii) to any breach of the SSA by the Claimant "including breaches which were fundamental, deliberate, or wilful in character". That application came before me on 4th March 2021 at a hearing conducted by MS Teams.

The Approach to Summary Judgment Applications.

20. The approach to be taken to summary judgment applications is not contentious as between the parties and was summarised thus by Lewison J at [15] in *Easyair Ltd v Opal Telecom Ltd*:

    i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
    ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
    iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
    iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
    v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also

the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

21. The Claimant's application relates to the scope of particular clauses of the SSA and their applicability to the breaches alleged by the Defendant. The Claimant denies it was in breach in the respects alleged and that any such breach was fundamental, deliberate, or wilful. However, it takes its stand on the construction of clause 1.4.1 and for the purposes of this application I will proceed on the basis that the Defence and Counterclaim sets out matters which are capable of being established as a matter of fact at trial and which, if established, would constitute breaches of the SSA in the respects alleged by the Defendant.

The Construction of Contracts in General.

22. The parties are also agreed on the principles governing the construction of contracts in general terms. Those principles are to be found in the Supreme Court decision of *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 explaining the approach taken in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.

23. The effect of those decisions was set out by the then Chancellor thus in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18] noting that the parties there did not dispute the following summary which had been formulated by HH Judge Pelling QC at first instance:

"i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed

by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see *Arnold v. Britton* [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20;

iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see *Rainy Sky SA v. Kookmin Bank* (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see *Wood v. Capita Insurance Services Limited* [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 13; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20 and *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 11."

24. For the Claimant Mr. Hale relied on the approach set out in that summary. Lord Marks did not dissent from that (and in any event I am bound by the Court of Appeal's analysis of the effect of the trilogy of Supreme Court decisions) but he did

urge me to continue to have particular regard to the actual terms of Lord Hodge's judgment in *Wood v Capita Insurance Services Ltd* at [10] – [14] noting especially Lord Hodge's explanation, at [13], that "textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation". As will be seen Lord Marks contends that this is a case where the context should cause the court to adopt a construction which would not follow from consideration of the language used standing in isolation.

The Approach to the Construction of Exemption Clauses.

25. Although agreed on the approach to be taken to the construction of contracts in general the parties differed as to the approach to be taken to the construction of terms excluding or restricting liability.

26. Mr. Hale said that clauses restricting or excluding liability are to be construed "following the principles applicable to contracts generally". However, he accepted that there should be a degree of strict construction with it being necessary for "clear and unambiguous expression" if liability is to be excluded or restricted with the "degree of strictness" of construction being influenced by whether the clause in question purports totally to exclude liability or instead to limit the compensation available in the event of a breach.

27. In their skeleton argument at [47] Lord Marks and Mr. Goodkin said "it is therefore a question of construction, on a case by case basis, whether a contract excludes liability for deliberate breaches. `Clear words' are required to exclude liability for such breaches." The second sentence operated as a qualification of the first or, rather, an indication of what was required before a clause could be construed as having excluded liability for a deliberate breach.

28. It is to be noted that Lord Marks disavowed any attempt to revive the doctrine that exclusion clauses did not apply where the party seeking to rely on them had been guilty of a fundamental breach: a doctrine rejected, as I will explain below, by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. The Defendant did, however, contend that the approach set out by Gabriel Moss QC sitting as a deputy in *Internet Broadcasting Corporation Ltd & others v MAR LLC* [2009] EWHC 844 (Ch) ("*Marhedge")* at [33] was correct. As will be seen below the deputy judge took the view that there was a strong presumption against an exclusion clause operating to preclude liability for a deliberate repudiatory breach of contract and that the presumption could only be rebutted by strong language.

29. Lord Marks modified that position to some extent in his oral submissions. He said that there was no real difference between an approach that clear words were needed before an exclusion clause could apply to a deliberate breach and one premised on there being a presumption against the exclusion of liability for such a breach. The Defendant's position as I understood it to be at the end of the oral submissions was that the presumption set out by Mr. Moss was not abandoned but that Lord Marks said he was "not pressing it too strongly" and instead took his final stand on the construction of the particular clauses here. Lord Marks did, however, maintain his argument that for a contractual term to be effective to exclude liability for a deliberate breach (at least for one of the gravity alleged by the Defendant) then the use of express language to that effect was necessary.

30. The starting point is the decision of the House of Lords in the *Photo Production* case. There the defendant provided a night patrol service for the plaintiff's factory. In the course of one patrol an employee of the defendant deliberately lit a fire which, although he had only intended to create a small fire, in due course burnt the factory down. The issue was the applicability and enforceability of a clause limiting the circumstances in which the defendant was to be "responsible for any injurious act or default by any employee" and excluding liability for loss caused through fire or any other cause save where solely attributable to the negligence of the defendant's employees. It was held that the words in question were clear and operated to relieve the defendant from liability for deliberate acts as well as for negligence. The members of the House of Lords rejected the formerly current doctrine that an exclusion clause did not operate to prevent liability where a contract had been brought to an end by a fundamental breach by the party seeking to rely on such a clause. They set out the correct approach to the construction of exclusion clauses in doing so they explained that such clauses were to be construed by reference to the generally applicable rules of contractual construction.

31. Thus at 842G – H Lord Wilberforce explained that the earlier decision of *Suisse Atlantique Societe d'Armement Maritime SA v N V Rotterdamsche Kolen Centrale* [1967] 1 AC 63 involved the House of Lords having rejected the former fundamental breach doctrine and:

> "to have firmly stated that the question is one of construction, not merely of course of the exclusion clause alone, but of the whole contract."

Adding

> "Much has been written about the *Suisse Atlantique* case. Each speech has been subjected to various degrees of analysis and criticism, much of it constructive. Speaking for myself I am conscious of imperfections of terminology, though sometimes in good company. But I do not think that I should be conducing to the clarity of the law by adding to what was already too ample a discussion a further analysis which in turn would have to be interpreted. I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract. Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached—by repudiatory breaches, accepted or not, by anticipatory breaches, by breaches of conditions or of various terms and whether by negligent, or deliberate action or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law."

32. At 846 Lord Wilberforce set out his conclusions as to the clause in question in that case. He referred to it having been "drafted in strong terms" and that the words used were "clear". It is, however, apparent that when seen in context his Lordship was not purporting to lay down a rule that an exclusion clause was only effective if drafted in strong terms but rather was pointing out that the particular clause had been so drafted.

33. At 848F Lord Diplock said:

> "A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in

> practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."

34. Then at 850E – 851C he added:

> "My Lords, an exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract, are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only.
>
> "My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977. In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations."

35. At 852 G Lord Salmon addressed the words of the clause in question concluding that they were "crystal clear" and "incapable of any other meaning" than that of excluding liability adding at 853D:

> "Any persons capable of making a contract are free to enter into any contract they may choose: and providing the contract is not illegal or voidable, it is binding upon them. It is not denied that the present contract was binding upon each of the parties to it. In the end, everything depends upon the true construction of the clause in dispute …"

36. Lord Keith agreed with the speech of Lord Wilberforce and then at 853G Lord Scarman described the situation in that case as "a commercial dispute between parties well able to look after themselves" and said that:

> "In such a situation what the parties agreed (expressly or impliedly) is what matters; and the duty of the courts is to construe their contract according to its tenor."

37. Finally in considering the approach laid down in *Photo Production* it is to be noted that at 843H Lord Wilberforce said:

> "At the judicial stage there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals. The learned judge was able to decide this case on normal principles of contractual law with minimal citation of authority. I am sure that most commercial judges have wished to be able to do the same: see *Trade and Transport Inc. v. lino Kaiun Kaisha Ltd*. [1973] 1 W.L.R. 210, 232, per Kerr J. In my opinion they can and should."

38. Lord Marks and Mr. Goodkin made extensive reference to the speeches in *Suisse Atlantique*. In particular they referred me to:

    i) The speech of Viscount Dilhorne at 392F – 393E saying that a provision giving an exemption from the consequences of a fundamental breach "must be expressed in clear and unambiguous terms" and that "it must be apparent that such is its purpose and intention" together with Viscount Dilhorne's approval of the judgment of Pearson LJ in *U. G. S. Finance Ltd. v. National Mortgage Bank of Greece and National Bank of Greece, S.A.* [1964] 1 Lloyd's Rep. 446.

    ii) Lord Reid's speech at 398F – 399B saying that exclusion clauses were to be construed strictly and his indication, as Lord Marks and Mr. Goodkin interpreted it, that exclusion clauses would not generally be construed as excluding liability for fundamental breaches.

    iii) Lord Hodson's indication at 401 that exclusion clauses should not normally be construed as applying to fundamental breaches and that "very clear words" were needed if that result were to be achieved.

    iv) Lord Upjohn's reference at 427E-F that there was a "strong though rebuttable presumption" that exclusion clauses did not apply to fundamental breaches.

    v) Lord Wilberforce's speech at 431G – 432G saying, inter alia, that "the more radical the breach the clearer must be the language if it is to be covered" and contemplating, at 435C – F, the possibility that the deliberate nature of a breach could be relevant to whether liability for the breach was excluded by a particular clause.

39. Lord Marks emphasised that the approach in *Suisse Atlantique* remained good law and prayed it in aid of his contentions as to the correct approach to the construction of exclusion clauses.

40. It is right that *Suisse Atlantique* does remain good law but it is to be read and applied as it was interpreted by the House of Lords in the *Photo Production* case. In that regard the passages from *Photo Production* already cited are of note. In addition at

841D Lord Wilberforce said that "the whole purpose and tenor" of the decision in *Suisse Atlantique* was to repudiate the erroneous fundamental breach doctrine and that:

> "The lengthy, and perhaps I may say sometimes indigestible speeches of their Lordships, are correctly summarised in the headnote—holding No. 3 [1967] 1 A.C. 361, 362—" That the question whether an exceptions clause was applicable where there was a fundamental breach of contract was one of the true construction of the contract."

41. Then, at 842F – G, Lord Wilberforce added:

> "…I am convinced that, with the possible exception of Lord Upjohn whose critical passage, when read in full, is somewhat ambiguous, their Lordships, fairly read, can only be taken to have rejected those suggestions for a rule of law which had appeared in the Court of Appeal and to have firmly stated that the question is one of construction, not merely, of course of the exclusion clause alone, but of the whole contract."

42. Lord Wilberforce's analysis of *Suisse Atlantique* was expressly approved by Lords Diplock (at 847C) and Salmon (at 853C) with Lords Keith and Scarman expressing their agreement with the entirety of Lord Wilberforce's speech.

43. Lord Marks characterised the decision of Teare J in *The A Turtle* [2008] EWHC 3034 (Admlty) [2009] 1 Lloyds Rep 177 as an illustration of a judge applying the principle that clear words are necessary before liability for a deliberate breach can be excluded.

44. In that case a towage connexion had been released in the course of a voyage because a tug had run out of fuel. Teare J had to consider the applicability in those circumstances of clause 18 of the standard form of towage contract known as TOWCON. The relevant parts of that clause were in the following wide terms:

> "The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:
>
> (i) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug.
>
> …
>
> (iii) Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (i) … above."

45. Teare J held that the clause applied in the circumstances of the case and operated to protect the defendant tug owner from liability. However, he explained that the clause only operated to exclude liability where the tug owners were actually performing their obligations under the TOWCON (as he found they were on the facts) albeit not to the required standard. Teare J noted that in adopting that interpretation of the clause his approach accorded with that which the Court of Appeal had taken to a wide exemption clause in the towage case of *The Cap Palos* [192] P 458.

46. At [109] and following Teare J explained the approach to be taken to construing the clause in question. At [109] he began by noting that the words were "of such wide ambit" that "construed literally" they would protect the tug owner against liability for "any damage whatsoever suffered by the tow". He then said:

> "However, contracts are not construed literally but, as it has been put in the past, with regard to the main purpose of the contract or, as it is now frequently put, in the context of the contract as a whole. Thus, however wide the literal meaning of an exemption clause, consideration of the main purpose of the contract or of the context of the contract as a whole may result in the apparently wide words of an exemption clause being construed in a manner which does not defeat that main purpose or which reflects the contractual context; see for example *Mitsubishi Corporation v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd's Rep 383 at paras 28 to 34 per Ian Glick QC and, for a recent summary of the general principles of contractual construction, see *Pratt v Aigaion Insurance Co SA* [2009] 1 Lloyd's Rep 225 at paras 9 to 12 per Sir Anthony Clarke"

47. At [110] Teare J quoted from the speech of Lord Wilberforce in *Suisse Atlantique* at 431 – 432 in these terms:

> "[An exception clause] must, *ex hypothesi*, reflect the contemplation of the parties that a breach of contract, or what apart from the clause would be a breach of contract, may be committed, otherwise the clause would not be there; but the question remains open in any case whether there is a limit to the type of breach which they have in mind. One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force; to do so would be to reduce the contract to a mere declaration of intent. To this extent it may be correct to say that there is a rule of law against the application of an exceptions clause to a particular type of breach. But short of this it must be a question of contractual intention whether a particular breach is covered or not and the courts are entitled to insist, as they do, that the more radical the breach the clearer must the language be if it is to be covered . . . No formula will solve this type of question and one must look individually at the nature of the contract, the character of the breach and its effect upon future performance and expectation and make a judicial estimation of the final result."

48. At [112] the learned judge cited the passage from page 851 of Lord Diplock's speech in *Photo Production* which I have quoted at [34] above noting that "a strained construction must not be placed on words which are clear and fairly susceptible of one meaning only".

49. At [116] Teare J considered what the position would have been if the tug owner had deliberately chosen not to perform the towage contract by releasing the connexion to perform a more profitable contract. He said "then very clear words would be required because that would be a very radical breach indeed". The judge then explained that the exemption clause in TOWCON was capable of being interpreted as applying only so long as the tug owner was actually performing its obligations and that he preferred that interpretation to an interpretation which would exclude all liability because it ensured that the obligations were not reduced to a mere declaration of intent.

50. Lord Marks emphasised Teare J's reference to "very clear words" being needed to exclude liability for a deliberate breach of the kind posited in his example "because that would be a very radical breach". However, those words must be read in the context of the judgment as a whole and when that is done they cannot be seen as purporting to articulate any special rule governing the construction of exclusion clauses either generally or by reference to those excluding liability for a deliberate breach. Teare J's explanation at [109] together with the authorities cited there and his quotations from the speeches of Lords Wilberforce and Diplock make it clear that he was seeking to apply the general rules of contractual construction as they were then

understood. Teare J noted that an exclusion clause was not to be construed so as to reduce a contract to a mere declaration of intent but that words fairly capable of only one meaning must be given their effect.

51. Unlike the approach of Teare J in *The A Turtle* that adopted by Gabriel Moss QC in *Marhedge* cannot be characterised simply as the application of the general rules of construction to an exclusion clause. Instead there the deputy judge took the view that a particular and not otherwise generally applicable approach was to be adopted in such cases.

52. The deputy judge was determining as a preliminary issue the construction of an exemption clause and its applicability to a deliberate personal repudiatory breach. Mr. Moss acknowledged that the effect of the decisions in *Suisse Atlantique* and *Photo Production* was that there was no rule of law preventing an exemption clause applying to a fundamental breach and that the question was one of construction. However, at [16] he derived from Lord Wilberforce's speech in *Suisse Atlantique* the view that "even as a matter of construction, the fact that a breach is deliberate and repudiatory is relevant to the question of whether the exemption clause, on its true interpretation, covers the breach". At [17] he found in *Photo Production* indications that there was a presumption against interpreting an exemption clause so as to cover a repudiatory breach.

53. At [22] the deputy judge derived from the speeches of Lord Wilberforce in *Suisse Atlantique* and *Photo Production* the proposition that clear language was needed to exclude liability for a repudiatory breach and that "clarity of language is to be equated with strength of language: the more radical the breach, the stronger the language that needs to be used".

54. At [25] "literalism" was rejected and Mr. Moss said that as a matter of construction "an exemption clause will never normally be interpreted as extending to a situation which would defeat the main object of the contract or create commercial absurdity, despite the literal meaning of the words used." He added, at [32],

> "Accordingly, if the parties intend an exemption clause to cover a deliberate repudiatory act by one party or either party personally, one would expect to see "clear" language in the sense of "strong" language, for example, "including deliberate repudiatory acts by [the parties to the contract] themselves ...". Words which literally cover the situation, but also a whole range of lesser situations, will not in my judgment be sufficient."

55. Mr. Moss summarised what he understood to be the applicable principles thus at [33]:

> "The principles I deduce from the authorities which are relevant to the present type of case of deliberate, repudiatory breach involving personal wrongdoing are as follows:
>
> (1) There is no rule of law applicable and the question is one of construction.
>
> (2) There is a presumption, which appears to be a strong presumption, against the exemption clause being construed so as to cover deliberate, repudiatory breach.
>
> (3) The words needed to cover a deliberate, repudiatory breach need to be very `clear' in the sense of using `strong' language such as `under no circumstances...'.

> (4) There is a particular need to use `clear', in the sense of `strong', language where the exemption clause is intended to cover deliberate wrongdoing by a party in respect of a breach which cannot, or is unlikely to be, covered by insurance. Language such as `including deliberate repudiatory acts by [the parties to the contract] themselves...' would need to be used in such a case.
>
> (5) Words which, in a literal sense, cover a deliberate repudiatory breach will not be construed so as to do so if that would defeat the `main object' of the contract.
>
> (6) The proper function between commercial parties at arm's length and with equal bargaining power of an exemption clause is to allocate insurable risk, so that an exemption clause should not normally be construed in such cases so as to cover an uninsurable risk or one very unlikely to be capable of being insured, in particular deliberate wrongdoing by a party to the contract itself (as opposed to vicarious liability for others).
>
> (7) Words which in a literal sense cover a deliberate repudiatory breach cannot be relied upon if they are `repugnant' - I have not dealt with this in detail because it is not relevant to this case."

56. Applying those principles the deputy judge concluded that in the absence of "strong language" (see at [36]) the exemption clause in question did not cover the defendant's breach notwithstanding that it would do so if interpreted literally.

57. As I have already noted in their skeleton argument Lord Marks and Mr. Goodkin placed considerable weight on the approach set out in *Marhedge* relying in particular on principles (2) – (5).

58. In *Astrazeneca UK Ltd v Albemarle International Corporation & another* [2011] EWHC 1574 (Comm) Flaux J addressed an argument that the exemption clause with which he was concerned did not apply to deliberate repudiatory breaches and concluded that the clause was "sufficiently clearly worded to cover any breach of the delivery obligations, whether deliberate or otherwise."

59. In the course of setting out the approach to be taken to the exemption clause with which he was concerned Flaux J considered the decision in *Marhedge.* Lord Marks sought to characterise the difference between the approaches of Mr. Moss and of Flaux J as one of emphasis but the difference cannot be minimised in that way. Thus from [288] onwards Flaux J analysed the *Marhedge* decision saying, at [289], that principles (2) and (3) were "wrong" and amounted to a revival of the discredited fundamental breach doctrine. He analysed Mr. Moss's citations from *Suisse Atlantique* and *Photo Production* concluding that the passages quoted were not reflective of the true effect of the speeches which were being quoted. Finally, at [301], Flaux J said the *Marhedge* judgment was "heterodox and regressive and does not properly represent the current state of English law". Flaux J said that if necessary he would "decline to follow it".

60. At [301] Flaux J said that the correct approach to determining whether the clause excluded liability for a deliberate repudiatory breach was "simply one of construing the clause, albeit strictly, but without any presumption."

61. At [294] Flaux J had characterised the approach articulated by Lord Wilberforce in *Suisse Atlantique* and *Photo Production* as:

> "…rejecting any artificial distinctions between different kinds or degrees of breach of contract or presumptions against the application of exclusion or limitation clauses and saying that, whilst such clauses are construed strictly against the party who seeks to rely on the clause, it is a question of construction of the clause in every case, as to whether it covers the particular breach in question."

62. Similarly, at [296], he said that the effect of Lord Diplock's speech in *Photo Production* was to reject the suggestion that there was a presumption that exemption clauses do not apply to deliberate repudiatory breaches and that Lord Diplock had instead been saying:

> "that whilst exemption clauses are construed strictly, it is always a question of construction of the clause whether it covers a particular breach, however that breach is categorised."

63. Thus there is a stark contrast between the approaches which Mr. Moss and Flaux J said were applicable as a matter of law to the construction of exemption clauses. I am confronted by two decisions of judges in the High Court setting out the law differently and where the later decision considered the earlier one and rejected the propositions of law contained therein. In those circumstances and in accordance with the approach set out by Nourse J in *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch 80 at 85 I am to apply the law as set out in the later decision unless I am convinced that it is wrong. Here not only am I not so convinced but I am satisfied that Flaux J's analysis of the law is the correct one. As explained by Flaux J Mr. Moss erred in his analysis of the true effect of *Suisse Atlantique* and *Photo Production*. In that regard Mr. Hale was right to point to the warning given by Lord Bridge in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 813D against "re-introducing by the back door" the doctrine of fundamental breach.

64. In my judgement the correct approach is accordingly that the position remains as set out in *Photo Production* and as summarised in the *Astrazeneca* case. Exemption clauses including those purporting to exclude or limit liability for deliberate and repudiatory breaches are to be construed by reference to the normal principles of contractual construction without the imposition of a presumption and without requiring any particular form of words or level of language to achieve the effect of excluding liability.

65. That approach derived from *Photo Production* and articulated in the *Astrazeneca* case is to be applied by reference to the general rules governing the construction of contractual terms which have now been enunciated in *Rainy Sky v Kookmin Bank* and *Arnold v Britton* as explained in *Wood v Capita Insurance Services Ltd* and summarised in *Lamesa Investments Ltd v Cynergy Bank Ltd*. The court is to construe the contract so as to give effect to the parties' intention as disclosed by the language read in context. In that exercise the court is to be conscious that the exclusion of a liability which would otherwise and ordinarily arise is to that extent a departure from the norm (the point made by Lord Diplock in the passage quoted at [34] above). That has the consequence that it will be inherently less likely than otherwise that a clause was intended to operate to exclude liability unless it is clear from the language when properly interpreted in context that it has that effect. It is from this understanding that the references to the need for clear words derive. In the absence of clear words the court is unlikely to conclude that a clause should properly be construed as excluding liability because in those circumstances a departure of this kind from the norm is

unlikely to have been intended. The nature of the term under consideration will also be relevant in considering the parties' intentions. Thus a limitation of liability can be regarded as reflecting an agreed allocation of risk and as being a lesser departure from the norm than would be a total exclusion of liability with the consequence that the court is more likely to conclude that a limitation of liability was intended than it would a total exclusion. There is, however, no presumption against the exclusion of liability and no requirement for any particular form of words or level of language. This is so regardless of the nature of the breach for which liability is being excluded and regardless of whether it is deliberate or repudiatory but subject to the important proviso that an exclusion or limitation of liability will not be read as operating to reduce a party's obligations to the level of a mere declaration of intent. As with any other contractual provision if the language of an exclusion clause is such that it is properly capable of only one meaning then effect must be given to it whereas if more than one meaning is properly possible then the court is to engage in an iterative process of construction as explained in *Wood v Capita Insurance Services Ltd*.

Construction of the Provisions of the SSA.

66. The first question to be addressed is whether I am in a position to determine the issue of the effect of the relevant clauses or whether that determination needs to await trial.

67. The Defendant contends that context will be highly significant in the construction exercise. It is said that the nature and effect of the Claimant's alleged breaches are crucial aspects of the factual matrix and neither the true nature nor the full effect of the breaches can be known until after the parties' evidence has been assessed at trial. It does not matter for these purposes whether this is seen as an argument that it cannot be said in advance of trial that the Defendant has no real prospect of succeeding on the disputed issues or as a contention that there is a compelling reason why disposal of the issues should await trial.

68. I do not accept that determination of these matters needs to await the trial nor do I accept that it should do so. It is important to remember that the context in which the SSA is to be interpreted is that which existed at the time the agreement was made. It is in the light of the factual matrix at that time and not subsequently that the language is to be construed. The context at the time of the concluding of the SSA is not markedly contentious and there is no basis for believing that the court's understanding or assessment of that context will be affected to any material degree by the evidence at trial. Doubtless more details would be filled in at that stage but the overall picture is unlikely to alter. Lord Marks submits that the scale and nature and the motive for the alleged breaches will only become clear after the trial. To an extent that is true but it does not assist the Defendant. That is because for summary judgment purposes I will proceed on the basis that the breaches alleged by the Defendant are such as to be capable of being established at trial. The trial will not materially improve the Defendant's position in that regard and the current issue is not whether there were breaches of the kind alleged but whether if there were such breaches they are nonetheless subject to the exclusions and limitations set out in clause 1.4.1. That clause is to be construed by reference to the context at the time it was agreed and I am to consider whether there is a real prospect of a conclusion that the words used did not operate to exclude or limit liability for the breaches currently alleged.

69. Lord Marks supplements this argument by asserting that a finding for the Claimant on the issue of the scope of these clauses will not significantly reduce the factual matters which will need to be determined at trial. This is because even on the Claimant's case if the breaches are made out there will still be a liability albeit one limited to £500,000. This means, Lord Marks asserts, that the questions of whether the Claimant was in breach in the respects alleged and of the loss caused to the Defendant by such breach will still need to be determined with the consequence that summary judgment in the Claimant's favour will save neither costs nor court time. That is not the proper test which is whether there is a defence on these issues with a real prospect of success. Moreover, in my judgement, it is unrealistic to say that conclusion of these issues now will affect neither the parties' approach nor the expense of the proceedings. It may not do so but in reality a determination that the counterclaim currently standing at more than £5m is or is not limited to £500,000 is likely to focus minds and to assist in the resolution of this matter.

70. I am satisfied that I am in position to come to a proper conclusion on the construction of the relevant clauses and of their applicability to the breaches alleged by the Defendant and that I should proceed to determine that question in accordance with the approach set out at proposition (vii) in *Easyair.*

71. Mr. Hale's arguments can be summarised shortly. He says that the clauses are expressed in clear language which on its natural meaning applies to the breaches alleged. Those clauses are, moreover, contained in a bespoke agreement which was drawn up in the context of the dispute which had arisen out of the earlier dealings and which was intended to resolve that dispute and to regulate the parties' rights and liabilities going forward. It is relevant, Mr. Hale says, to note that the clauses limit rather than exclude the Claimant's potential liability generally with the exclusion of liability applied in five particular sets of circumstances. Moreover, he says that the Defendant was in a position to make an assessment of the potential consequences to it of breaches by the Claimant and to insure against such consequences. It is, the Claimant says, a clear agreement making commercial sense and to the extent that the Defendant has made a bad bargain the court is not to adopt an artificial construction so as to enable the Defendant to escape from that bad bargain.

72. For the Defendant Lord Marks accepted that read literally the relevant parts of clause 1.4.1 were all-encompassing but argued that the context meant that they were not effective to exclude or limit liability for a deliberate refusal to perform. The context was such that express language would be needed before the court should interpret the words as covering such a breach. To the extent that this contention amounted to saying that as a matter of law particular language was needed before liability for a deliberate breach could be limited or excluded I have already explained my rejection of that approach. However, to the extent that this is a contention that properly construed by reference to general principles the clauses are not effective to exclude or limit liability then it must be considered by reference to the language used and the context.

73. It was in that context that Lord Marks disavowed any intention to revive the fundamental breach doctrine but said that it was nevertheless relevant to look to the gravity of the breaches in question. Lord Marks placed considerable emphasis on the fact that the allegation was of deliberate breaches amounting to a refusal to perform with the motive of pressurising the Defendant into making payment which was not

properly due. He said that for the clauses to apply to such breaches would remove the purpose of the SSA and reduce the Claimant's agreement to perform to no more than a declaration of intent. In considering that argument I do not regard the reference to the Claimant's motivation as adding anything of substance but there is more force in the point that the breaches alleged here amount to a deliberate refusal to perform.

74. Lord Marks placed considerable stress on aspects of the drafting of the SSA which he said were deficient. He did so in the context of referring to Lord Hodge's comments in *Wood v Capita Insurance Services Ltd* at [13] and of inviting me to regard the provisions as lacking clarity with the consequence that I should turn from the language used to the factual matrix or at least be wary of simply looking to the words used.

75. As I have already noted Lord Marks had highlighted the acknowledgement at clause 5A that the parties had not had sufficient time to finalise the Master Deliverables Schedule despite the importance of that document. He also attacked the drafting of clause 1.4.1. Thus he said that clause 1.4.1 ii) b c) was so difficult to construe as to be meaningless. I do not find that to be a valid criticism of that sub-clause. The language is not elegant and there is an element of surplusage but the intention of excluding liability for delay occurring before the SSA is clear. It might have been unnecessary to have such a provision but it can be given a meaning.

76. Similarly Lord Marks said that there was an irreconcilable inconsistency between clause 1.4.1 ii) b b) which operated to exclude liability for any loss unless the Claimant was shown to be "solely responsible in full for such loss" and 1.4.1 iii) which limited the Claimant's liability to such sums as it would be just and equitable for the Claimant to pay having regard to its responsibility for the loss in question. He pointed to this inconsistency as an instance of the sloppiness of the drafting of the SSA. Mr. Hale accepted that there was a potential overlap between these provisions though he drew attention to the fact that 1.4.1 iii) was expressly said to be without prejudice to the preceding limits on and exclusions of liability so that it was something of a fallback or reserve provision.

77. Considerable emphasis was placed by the Defendant on the interrelation between the payment provisions and the limitation on liability. Clause 1 (c) provided for the sum of £570,000 which the Defendant had paid into court to be paid to the Claimant. Under clause 2 a further £500,000 was to be paid within two working days of the execution of the SSA. Then clauses 3 and 6 operated to cause a further £500,000 to be paid on the earlier of various dates including the completion of the Scope of Services whether those services had been completed by the Claimant or "any other design consultant". Under clause 1.4.1 ii) a the Claimant's liability was to be limited to a total of £500,000. Lord Marks said that the effect of this was that the Claimant could deliberately refuse to perform its obligations necessitating the completion of the works by a different consultant but still be entitled to payment of a further £500,000 in addition to the sums totalling £1,076,000 already paid or payable and with the Claimant's liability for its refusal to perform being limited to £500,000. The effect would be that the Claimant was at no risk in failing to perform. Lord Marks contended that if applicable to a deliberate refusal to perform such provisions were commercially nonsensical and reduced the Claimant's obligations to mere declarations of intent.

78. In addition the Defendant pointed to the scale of the consequences which the Defendant was at risk of suffering if there were a deliberate refusal to perform on the part of the Claimant. It was said that the availability of insurance should not be regarded as relevant because the insurance position to be considered was that of the Claimant and the Claimant would not be able to insure against its own deliberate breach let alone one which amounted to a deliberate refusal to perform. I do not accept that the only relevant insurance position was that of the Claimant. Instead there is considerable force in Mr. Hale's characterisation of the arrangement as being an allocation of risk in circumstances where the Defendant was in a position (and at least arguably in a better position than the Claimant) to assess the potential financial consequences of a breach by the Claimant and to insure against that risk.

79. How are the clauses on which the Claimant relies to be construed in the light of those arguments?

80. The clauses are in clear terms and are, as the Defendant accepts, capable when read naturally of applying to the alleged breaches. They are contained in a bespoke agreement entered into between two commercial entities and designed both to resolve an existing dispute and to set out a regime governing their further dealings with a view to avoiding a renewed dispute.

81. It will be a rare contract where no criticism can be made of the quality of the drafting. I do not read the contrast drawn by Lord Hodge in *Wood v Capita Insurance Services Ltd* at [13] between well-drawn agreements and those which are poorly drafted as an invitation to conduct an artificial or minute textual analysis looking for imperfections in the drafting with a view to concluding that any imperfection should cause the court to turn from the language used to the factual matrix. The point being made was, in my judgement, at a higher level of generality. The contrast is between comprehensive documents which are the fruit of careful drafting with professional input and those marked by informality or brevity and drawn up without professional assistance albeit noting that complexity and professional input are not a guarantee against a lack of clarity. Here clause 1.4.1 contains a number of elements dealing differently with different circumstances and having the appearance of a comprehensive regime regulating the Claimant's liability to the Defendant. The imperfections and infelicities to which Lord Marks has pointed do not come close to demonstrating this is a text which is not logical or coherent or which lacks clarity such that reliance should move from the language used to the factual matrix.

82. The Defendant's strongest argument is that which points to the interrelation between the limitation on the Claimant's liability and the Claimant's entitlement to payment even if the services are completed by a different consultant. It is, moreover, to be remembered that the issue is whether the clauses excluding and limiting liability apply to deliberate and wilful breaches taking the form of a refusal to perform. Do these matters mean that if applied to a deliberate breach the limitation on or exclusion of liability is commercially nonsensical or such as to reduce the Claimant's obligations to a mere declaration of intent?

83. To some extent this is a matter of the figures. If the limitation on the Claimant's liability were set at £3m rather than £500,000 then the argument would very largely fall away. Lord Marks responded to that point by reminding me that I am to construe the agreement as it stands and that as it stands the cap is at £500,000. That, however,

is not a complete answer because the levels of the limitation on liability and of the amounts to be paid to the Claimant are matters of commercial balance and negotiation in respect of which the court must be alert to avoid intervening to protect one or other party from the consequences of a bad bargain. In my judgement the limitation on liability does not, even when seen alongside the payment provisions, render the contract nugatory. A breach will still have consequences for the Claimant in that it will have a potential liability to pay up to £500,000 to the Defendant. It may be that the consequence of that is only that after a balancing exercise between the parties the Claimant obtains a total payment less than it would otherwise have done rather than making a payment to the Defendant which might have been the position without the cap on liability but that is nonetheless an adverse consequence for the Claimant. Similarly the effect on the Defendant might be that rather than recovering a balance from the Claimant (as would potentially have been the position without the limitation on liability) it ends up paying less to the Claimant in total than would have been the case if there had been no breach. It follows that if the limitation is upheld a breach is not painless for the Claimant albeit the consequences for the Claimant are less grave than they would have been without that limitation.

84. However, there is a further answer to the Defendant's argument. The payment obligations imposed on the Defendant depend on the SSA remaining in being. In the event of a repudiatory breach on the part of the Claimant it would be open to the Defendant to accept such a repudiation as a termination of the contract. That termination would not cause the SSA to be of no effect for all purposes (that was the former and mistaken fundamental breach doctrine) and the exclusion and limitation clauses would continue to have effect. It would, however, mean that the Defendant was freed from a requirement to perform obligations falling due for performance after the date of termination. In those circumstances the difficulty to which Lord Marks refers of the Defendant having to make payment to the Claimant under clause 3 even if the works are performed by a different consultant while at the same time having its recovery from the Claimant limited to £500,000 would not arise. If the liability cap is effective then in the event of a repudiatory breach accepted by the Defendant as terminating the agreement the Claimant would remain liable albeit to the limit of the cap. Thus it cannot be said that the Claimant's obligations are reduced by the liability cap to a mere declaration of intent. The Defendant has not contended that the SSA has been terminated by its acceptance of a repudiatory breach but the scope for such a termination in the event of a repudiatory breach is of relevance given that I am to consider the Defendant's argument that the clauses in dispute cannot be regarded as having applied to deliberate and wilful breaches deriving from the Claimant's refusal to perform.

85. I have focused on the liability cap because that was the principal battleground between the parties although the matters set out above also apply to the other clauses. In the light of the conclusions which I have reached about that the liability cap I can deal with the other clauses very shortly. The exclusions clause is in the clearest of terms. It excludes liability for particular categories of loss but although it is potentially wide-ranging in its effect the clause by no means precludes all liability and does not reduce the Claimant's obligations to a mere declaration of intent even if the excluded losses result from a deliberate or wilful breach. Similarly the net contribution clause is clear and cannot be said either to be nonsensical or to remove the contractual effect of the Claimant's obligations.

86. I return to the crucial point which is that the clauses with which I am concerned are set out clear language capable of covering breaches such as those alleged by the Defendant and are in a bespoke agreement avowedly intended to be a comprehensive regulation of the parties' future dealings. To adopt the Defendant's contentions would amount to the implication of exceptions to the clear terms of those clauses. There is no basis for such a construction which would have the effect of restricting the clear scope of these clauses.

Conclusion.

87. It follows that I am satisfied that when properly construed the clauses in question are applicable to any breach by the Claimant of the SSA including breaches which were fundamental, deliberate, or wilful and that there is to be summary judgment on the construction question in the Claimant's favour.