



## English contract law cases of 2021

Stability and certainty remain the watchwords

## English contract law cases of 2021

The last year has been a turbulent time for businesses as the effects of Covid-19 and Brexit continue to hit home.

The resulting disputes are now starting to percolate through to the English Courts, whose response has been to maintain stability and uphold the certainty of contract.

Despite the opportunities to innovate – for example, the attempt to persuade the Court to recognise a concept of “*temporary frustration*” to alleviate the impact of Covid-19 lockdowns – there has been little new contract law so far in 2021. A common theme from the decisions in 2021 is that, unless there is specific relief provided for by the contract itself, the English Courts will rarely intervene to alter the bargain the parties have made.

In the one genuine development this year, the Supreme Court confirmed that the doctrine of lawful act duress exists in English law; however, it has only done this in a cautious and incremental way. Otherwise, there have been no significant departures from existing legal principles. However, understanding how existing principles have been applied by the Courts is illuminating and flexibility within the law remains. For example, the Courts are still prepared to correct irrational drafting mistakes and will still ensure that contractual discretions are exercised properly. Similarly, the scope and effect of exclusion or limitation clauses remains a live issue, as we highlighted [last year](#).

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### Duress

#### Can a contract be set aside if entered into under threats of lawful action?

The Supreme Court was recently tasked with answering the following fundamental questions: does a doctrine of lawful act duress exist in English law and, if it does, what is its scope?

A contract which a party is induced to enter into under duress or through illegitimate pressure can be avoided or set aside. Lawful act duress is where the pressure is constituted by a threat to take steps that are, of themselves, lawful.

The Court confirmed that a doctrine of lawful act duress does exist but at the same time it noted that it will be rare that a Court will find that it has occurred in the context of commercial contractual negotiations.

The decision itself illustrates that. Times Travel (UK) Ltd (“Times Travel”) acted as a ticketing agent to Pakistan International Airline Corporation (“PIAC”). Times Travel was dependent on its ability to sell PIAC’s tickets for its business viability. By 2012, a large number of PIAC’s ticketing agents had either commenced or threatened proceedings to recover substantial sums they said PIAC owed to them by way of commission.

In September 2012, PIAC presented Times Travel with a “no win” choice. It gave lawful notice of the termination of its existing agency contract with Times Travel and cut Times Travel’s fortnightly ticket allocation to a fifth of what it had been previously (as it was entitled to do). Times Travel could either:

- > accept the end of its relationship with PIAC, which would effectively end its business; or
- > sign a new contract waiving its claims for unpaid commission.

Times Travel signed the new contract. Two years later, Times Travel brought proceedings to recover the unpaid commission and other payments.

The Supreme Court held that Times Travel could not rescind the new contract. The Court recognised that the concept of lawful act duress does exist where there is: (i) an illegitimate threat; (ii) sufficient causation; and (iii) no alternative for the threatened party. However, it also concluded that there were only two situations to date in which the criteria for lawful act duress have been satisfied, namely:

- > threatening to report criminal activity by the claimant or a family member; and
- > using illegitimate means to manoeuvre the claimant into a position of weakness to force the claimant to waive its claim.

These are only examples of what the Court will treat as unconscionable and illegitimate for the purposes of lawful act duress and are not exhaustive, but the Supreme Court indicated that the doctrine should be applied rarely and restrictively.

Here PIAC’s conduct had not been reprehensible or unconscionable in the sense required by the case law. There was no bad faith on the facts (PIAC genuinely believed it was not liable to pay the commission) but the majority of the judges were clear that what is required is more than a bad faith demand based upon a stronger bargaining position. They were heavily influenced by the fact that English law does not have any overriding doctrine of good faith or a doctrine of imbalance of bargaining power.

**What does this mean for you?** The Supreme Court has clearly signalled that the scope of this doctrine is narrow so as not to interfere with legitimate commercial negotiation even when that amounts to a robust assertion of monopoly power.

**Where can you read more?** See [Pakistan International Airline Corporation v Times Travel \(UK\) Ltd \[2021\] UKSC 40](#) and read more in our client briefing [here](#).

*“in commercial life many acts are done under pressure and sometimes overwhelming pressure...Inequality of bargaining power means that one party in the negotiation of a commercial contract may be able to impose terms on a weaker party which a party of equal bargaining power would refuse to countenance.”*

**Lord Hodge, paragraph 26**

### The Covid-19 cases

#### Aircraft rent still due when flights grounded

The High Court has held that, in the context of 10-year aircraft leases, a suspension of use of the aircraft for one year did not amount to frustration of the contract and therefore did not absolve the lessee from paying rent.

The lessee's use of one type of aircraft had been considerably curtailed as a result of Covid-19 and the other had been grounded in India following fatal crashes of similar aircraft. It was therefore illegal for the lessee to operate these aircraft at the time of the application for summary judgment for payment. The High Court held that suspension did not make performance of the leases "*radically different*", just more onerous. These were "dry" leases, where the lessee takes all risk and responsibility in relation to the operation and maintenance of the aircraft and the lessor's obligations are effectively limited to warranting quiet enjoyment. However, without expressing a view, the judge noted that, if there were still no sign of the ban being lifted in three years' time, that might amount to frustration – in which case, any sums paid to the lessors (who were granted summary judgment at this stage) would then become repayable under the Law Reform (Frustrated Contracts) Act 1943.

#### Rent still due for empty cinemas

Two cases this year, in which commercial tenants sought relief from payment of rent in the light of Covid-19 related restrictions, are interesting.

A cinema in the London Trocadero sought relief from paying rent during the period it was shut as a result of the Covid-19 lockdowns. The relief was rejected on two grounds:

- > There was no room for an implied term to that effect: it was not necessary to ensure the contract had commercial or practical coherence and was not so obvious it went without saying, under the principles set out in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited & Anor* [2015] UKSC 72. The implied term would also be inconsistent with the express terms of the contract which provided rental relief if the premises were damaged but made no provision for pandemics.
- > There was no "*failure of consideration*": the tenant continued to have possession of the premises throughout the lockdowns.

Inability to use premises as intended (that is, profitably) because of UK Covid-19 legislation was a basis for the tenants in the second case arguing for relief from the obligation to pay rent on the grounds of "*temporary frustration*". This was held to be an argument with no real prospect of success – temporary frustration is not a doctrine recognised by English law. The obligation to pay rent had not become illegal, nor was it impossible, temporarily or otherwise. The Court acknowledged that leases could, in principle, be frustrated by an enforced closure resulting from a supervening event such as Covid-19. However, the length of the closure needs to be considered in the light of the term of the lease to see whether it can truly be said to make the situation so "*radically different*" from what the

**What does this mean for you?** Frustration remains very hard to prove. For parties who think they might need a safety net in extreme or unforeseeable circumstances, it is advisable to include a contract-specific relief clause, whether that is a force majeure provision or something more bespoke.

**Where can you read more?** See *Wilmington Trust (SP) Services (Dublin) Ltd & Ors v Spicejet Ltd* [2021] EWHC 1117 (Comm).

*"in the context of a ten-year lease, I find it very difficult to say that a suspension of use for roughly 10% of the term of the lease amounts to a change of circumstances which renders performance of the lease "radically different" rather than simply more onerous."*

Miss Julia Dias QC, paragraph 65

parties had in mind when entering into the lease that it would be "*unjust*" for it to continue. That was not the case here. The tenants also relied upon a Code of Practice for commercial premises issued by the UK Government in the light of the pandemic to argue that it was inappropriate for the landlord to insist upon payment of rent in full. This argument was also dismissed as the Code was both voluntary and guidance only (and, in fact, stated that "*Tenants who are in a position to pay in full should do so*").

**What does this mean for you?** Despite the creativeness of the arguments employed, this illustrates the difficulty of using the impact of Covid-19 to avoid paying rent on common law grounds.

**Where can you read more?** See *London Trocadero (2015) LLP v Picturehouse Cinemas Limited & Ors* [2021] EWHC 2591 (Ch) and *Bank of New York Mellon (International) Limited v Cine-UK Ltd* [2021] EWHC 1013 (QB).

On 9 November 2021, the UK Government made its long-awaited announcement setting out the path ahead for landlords and tenants impacted by the Covid-19 pandemic – read more [here](#).

*"there is no such thing as a "temporary frustration", effectively suspending the contract for a period of time, in law."*

Master Dagnall, *Bank of New York Mellon*, paragraph 211

### The Covid-19 cases

#### Force majeure and the Braganza duty – Two worlds collide

However, not all claims for relief as a result of Covid-19 are bound to fail. In this case, a clause in a franchise agreement stated that the agreement would be suspended during any period in which either of the parties was prevented or hindered from complying with their obligations “*by any cause which the Franchisor designates as force majeure*”.

During March 2020, the franchisee’s owner (who was effectively the franchisee) was advised by the NHS that his son was vulnerable and would need to stay at home for the next 12 weeks. The franchisee requested a suspension under the clause but the franchisor refused to designate a force majeure event in the circumstances.

The High Court held that the franchisor was in repudiatory breach of the agreement. The clause included an implied term that the power of designation would be exercised honestly, in good faith and genuinely (and not arbitrarily, capriciously, perversely or irrationally), applying the principles in *Braganza v BP Shipping Ltd* [2015] UKSC 17. The franchisor in exercising that power was obliged to take into account all the relevant matters. However, it had only addressed the effect of Covid-19 upon turnover of the business by reference to demand and had not taken into consideration the need for isolation for family safety. In any event, on the facts, the franchisee had affirmed the agreement by accepting an alternative offer so that it was in repudiatory breach when it later terminated the agreement.

**What does this mean for you?** All force majeure clauses need to be considered on their specific terms. Here, the franchisor had a wide power to decide whether an event constituted force majeure, which is unusual. However, this case is a helpful reminder that, where one of the parties has to exercise any contractual discretion, they need to take into account all relevant matters when making a decision.

**Where can you read more?** See *Dwyer (UK Franchising) Ltd v Fredbar Ltd & Anor* [2021] EWHC 1218 (Ch) or read more about good faith and the Braganza duty in a practice note for Practical Law (available [here](#)), which provides a detailed and comprehensive overview of the current state of the law.

#### The clause:

*“This Agreement will be suspended during any period that either of the parties is prevented or hindered from complying with their respective obligations under any part of this Agreement by any cause **which the Franchisor designates** as force majeure including strikes, disruption to the supply chain, political unrest, financial distress, terrorism, fuel shortages, war, civil disorder, and natural disasters.”* [Emphasis added]

### Exclusion and limitation clauses

#### References to “negligence” may drive a coach and horses through your liability cap

A contract for the provision of a software-based business system contained a cap on the contractor’s overall liability but it carved-out “*negligence*” from that cap.

The question was whether “*negligence*” just meant the freestanding tort of negligence or also included breach of a contractual duty of skill and care. The majority of the Supreme Court decided it had the broader meaning and so liability was uncapped for both the tort of failing to use due care and a breach of a contractual provision to exercise skill and care. In this case, this interpretation would not deprive the cap of practical effect: the contract was not only for services (which attract a duty of skill and care), it also contained numerous strict obligations too (“*obligations of result*”). A good example of the latter was an obligation to provide defect-free software which met functionality specifications. The cap still limited the liability of the contractor for breach of the obligations of result.

**What does this mean for you?** What is covered by a liability cap is a vital question for both parties. In a contract for services only, a carve-out of “negligence” might drive a coach and horses through any such cap.

**Where can you read more?** See *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29.

#### The clause:

*“The total liability of [Triple Point] to PTT under the Contract shall be limited to the Contract Price received by [Triple Point] with respect to the services or deliverables involved under this Contract. ... **This limitation of liability shall not apply to [Triple Point]’s liability resulting from fraud, negligence, gross negligence or wilful misconduct of [Triple Point] or any of its officers, employees or agents.**”* [Emphasis added]

### Exclusion and limitation clauses

#### Can you limit liability for deliberate breach of contract?

Should a limitation of liability clause exclude liability for deliberate repudiatory breaches? This can be a controversial question, which has attracted conflicting authority.

In the latest decision on this issue, the High Court examined three limitation and exclusion clauses which did not expressly address the point. The clauses were: (i) a cap on the service provider's overall liability; (ii) a clause stating that the service provider would have "*no liability whatsoever for any loss*" in respect of a variety of matters; and (iii) a net contribution clause. It held that they did limit and exclude liability for "*fundamental, wilful ...[and] deliberate*" breaches of contract.

Following the earlier decision in *AstraZeneca UK Ltd v Albemarle International Corporation & Anor* [2011] EWHC 1574 (Comm) and applying the normal principles of contractual interpretation, the High Court held that the clauses in question were set out in clear language capable of covering deliberate breaches. The Court stated that there is no presumption against the exclusion of liability for deliberate breach and no requirement for any particular form of words.

#### Excluding liability for loss of profit: excluding more than you might think?

In the context of a failed IT development project, the High Court held that a claim for £128 million in wasted costs in respect of wrongful termination was excluded as neither party was liable for "*loss of profit*" under an exclusion clause in the contract. The claimant had argued that the money for wasted costs would simply put it in a "*break-even position*", given the project was abandoned and provided no value.

The Court found that a claim for wasted costs was just another way of quantifying loss of profit, and so was excluded under the contract terms.

The Court distinguished *The Royal Devon and Exeter NHS Foundation Trust v ATOS IT Services UK Ltd* [2017] EWHC 2197 (TCC), where a wasted costs claim was permitted, even though loss of profit was also expressly excluded, on the basis that the NHS Trust was not profit-making.

However, this is 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.

**What does this mean for you?** If you do not want an exclusion or limitation clause to apply in a situation of deliberate breach (or "wilful default"), it is best to say that expressly.

**Where can you read more?** See *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC).

*"I am satisfied that when properly construed the clauses in question are applicable to any breach by the Claimant...including breaches which were fundamental, deliberate, or wilful."*

**His Honour Judge Eyre QC, paragraph 87**

**What does this mean for you?** This aspect of the decision seems surprising, with the exclusion clause being given wider effect than contracting parties might expect. It provides another reason to be wary of exclusions of loss of profit and to address specifically whether wasted costs will be recoverable.

**Where can you read more?** See *CIS General Insurance Ltd v IBM United Kingdom Ltd* [2021] EWHC 347 (TCC) and our client alert on all aspects of the decision (which also includes endeavours clauses and notice of non-compliance clauses) [here](#).

*"A conventional claim for damages in this type of commercial case would usually be quantified based on those lost savings, revenues and profits. CISGIL is entitled to frame its claim as one for wasted expenditure but that simply represents a different method of quantifying the loss of the bargain; it does not change the characteristics of the losses for which compensation is sought."*

**Mrs Justice O'Farrell DBE, paragraph 683**



### Exclusion and limitation clauses

#### Exclusion and limitation provisions should be in their own clause

A clause in a manufacturing agreement also contained a broad exclusion of liability for loss of profit. However, when the defendant relied upon the clause to argue that the other party's claim for loss of profit was excluded, the High Court refused to give it that effect.

This was for two reasons: (i) the clause was contained within a wider clause relating to indemnities, third party claims and insurance (and was found to be confined to those situations); and (ii) it would allow the defendant to walk away without liability.

Given the clarity of the words in the exclusion clause, this decision seems a little odd and gives greater emphasis to positioning rather than language. The English Courts have not generally treated exclusions of economic losses as all embracing. However, it is similar to the approach of the Court of Appeal in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38.

**What does this mean for you?** The cautious response to this judgment is to place exclusion provisions in a clause by themselves and ensure that they have a clear heading.

**Where can you read more?** The judgment in *Acerus v Recipharm* [2021] EWHC 1878 (Comm) is not available on a public website. If you would like a copy of the judgment, please contact one of the people named at the end of this publication.

#### The clause:

*"in no circumstance shall either party be liable to the other in contract, tort (including negligence or breach of statutory duty) or otherwise howsoever to the other, and whatever the cause thereof (i) for any increased costs or expenses, (ii) for any loss of profit, business or contracts, revenues or anticipated savings or (iii) for any special indirect or consequential loss or damage of any nature whatsoever arising from this Agreement."*

### Contractual remedies

#### Supreme Court on liquidated damages for delay

Liquidated damages for delay in completing a project can provide a valuable contractual remedy in a range of contract types (including IT and construction contracts). There are advantages for both parties: the party who will receive payment does not have to prove its actual loss and the paying party is able to size its potential liability for delay from the outset.

In overturning a decision of the Court of Appeal which had run contrary to "orthodox" analysis, the Supreme Court has held that liquidated damages for delay will accrue up to termination of a contract unless the relevant clause states otherwise. This means that, if the contract is terminated before completion is reached, any accrued rights which a party has to payment of liquidated damages remain.

**What does this mean for you?** This is a welcome return to orthodoxy which reflects the important role which liquidated damages can play. It also makes commercial sense in the context of other common, related contract terms. For example, liquidated damages are often capped with a corresponding right to terminate once the cap is reached. In that scenario, the right to payment of liquidated damages up to the cap is not something the terminating party would be expecting to lose.

**Where can you read more?** See *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29.

*"A liquidated damages clause...serves two useful purposes. First, establishing what financial loss delay has caused the employer would often be an intractable task capable of giving rise to costly disputes. Fixing in advance the damages payable for such delay avoids such difficulty and cost. Second, such a clause limits the contractor's exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project."*

**Lord Leggatt, paragraph 74**

### Interpretation and incorporation

#### Drafting mistakes – The difference between imprudent and irrational

While the Courts place great weight on the wording in the contract, they are still prepared to recognise and correct some drafting mistakes when interpreting a contract.

The Court of Appeal had to consider a rent review clause in the lease of a solar park where a literal reading of the clause would have meant that the rent payable by year 25 of the lease could be just over £76 million, having started at just £15,000. The Court drew upon the principle enunciated by Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1011 that the literal meaning of a provision can be corrected if it is clear that a mistake has been made and what the provision was actually intended to say.

The Court did not consider that this principle had been affected by the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36 (where the Supreme Court refused to correct a rent review clause which proved to be an extremely bad bargain for the tenant). In this recent case, the Court of Appeal drew a distinction between an imprudent mistake (which had been made in *Arnold v Britton*) and an irrational one, producing arbitrary, nonsensical or absurd results, as had been the case here. This mistake was “*about as plain a case of such a mistake as one could find*”.

What was the mistake in question? The rent was to be reviewed annually using a rent review formula that operated by reference to the Retail Prices Index (“RPI”). Read literally, the formula required the rent to be compounded year on year and also increased, year on year, by the same factor for which the rent was originally increased.

The Court of Appeal agreed with the tenant that the formula should be construed so that the rent was indexed in line with RPI.

**What does this mean for you?** A good way to test whether a formula in a contract will work for you is to try out a few worked examples before agreeing to it.

**Where can you read more?** See *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961.

*“the results of applying the Formula literally can aptly be described as both arbitrary and irrational; indeed I think they can equally be described as commercially nonsensical or absurd, such that it cannot be supposed that rational parties really intended them.”*

**Lord Justice Nugee, paragraph 39**

#### Onerous terms – Has adequate notice been given?

A purchase order in a business to business contract for mobile telephone handsets stated:

*“by signing this document I agree I have logged on to the Blu-Sky website at [web address]..., have read agree and fully understand all terms and conditions regarding the contract and the policy protection scheme & free trial (\*where applicable) and am bound by the same.”*

Although the customer did not access (and so did not read) the standard terms and conditions (“STCs”) before signing, the High Court found that they had been incorporated into the contract on the basis that they were accessible had the customer gone to the supplier’s website, navigated to the bottom and clicked on the link. However, crucially, not all of them: a clause requiring the customer to pay early cancellation fees was **not** part of the contract.

It is a well-established principle of common law that, even if A knows that there are standard conditions provided as part of B’s tender, a condition which is “*particularly onerous or unusual*” will not be incorporated into the contract, unless it has been fairly and reasonably brought to A’s attention (*Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371). Here, the cancellation charge was a particularly onerous term (since the amount of the administration charge bore no relationship to any administration costs), so the supplier should have taken extra measures to draw attention to it to ensure that the other party would be bound by it.

Similar issues were at play in a case concerning online betting.

When a customer wanted to cash in their winnings of some £1.7m, the betting company maintained that there had been a software glitch and that its exclusion clauses allowed it to withhold payment in those circumstances. The High Court found that the clauses did not cover the situation which had occurred but, even if they had done so, they had not been properly drawn to the customer’s attention and so were not incorporated into the contract. As the customer was a consumer, even if the terms had been incorporated, the betting company could not rely on them as they were not clear, fair or transparent, as required by the Consumer Rights Act 2015.

**What does this mean for you?** The lesson is clear: make onerous terms in standard terms and conditions obvious and bring them to the counterparty’s attention, preferably through a list of key terms.

**Where can you read more?** See *Blu-Sky Solutions Limited v Be Caring Limited* [2021] EWHC 2619 (Comm) and *Green v Petfre (Gibraltar) Limited t/a Betfred* [2021] EWHC 842 (QB) (with more on the latter case [here](#)).

*“Whilst I accept that the STCs were reasonably clearly brought to the defendant’s attention in the order form, the offending clause itself was not and was cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate.”*

**His Honour Judge Stephen Davies, Blu-Sky, paragraph 111**

## Notices

### What should be included in a notice of claim?

A share purchase agreement provided that the Warrantors (who included a number of the Sellers) would pay the Buyer an amount equal to any tax liability which arose in certain circumstances. The relevant clause stated that a claim would only be valid if the Buyer provided written notice stating in reasonable detail the matter which gave rise to the claim, the nature of the claim and (so far as reasonably practical) the amount claimed.

The Court of Appeal (allowing an appeal from the decision of the High Court as we reported [last year](#)) held that what is reasonable must depend on all the circumstances including the commercial purpose of the clause, what businessmen in the position of the parties would treat as reasonable and, importantly, what is already known to the recipient. The “matter” giving rise to the claim was the underlying events, facts and/or circumstances. On the facts, reasonable detail had been given.

**What does this mean for you?** When considering whether adequate notice has been given, the English Courts will look at the requirements of the relevant clause and the context in which it arises. Clauses tend to be contract-specific so that an understanding of what is specifically required in any given case will be key.

**Where can you read more?** See [Dodika Ltd & Ors v United Luck Group Holdings Ltd](#) [2021] EWCA Civ 638.

*“What is reasonable takes its colour from the commercial purpose of the clause, and what businessmen in the position of the parties would treat as reasonable. Businessmen would not expect or require further detail which served no commercial purpose. That would be the antithesis of what was reasonable.”*

Lord Justice Popplewell, paragraph 46

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