Transocean Drilling U.K. Ltd v. Providence Resources Plc
Case No: A3/2015/0855
Court of Appeal (Civil Division)
13 April 2016

[2016] EWCA Civ 372

2016 WL 01377248

Before: Lord Justice Moore-Bick Vice-President of the Court of Appeal, Civil Division Lord Justice McFarlane and Lord Justice Briggs
Date: Wednesday 13th April
2016

Analysis

On Appeal from the High Court of Justice Queen's Bench Division Commercial Court

Mr. Justice Popplewell

[2014] EWHC 4260 (Comm)

Hearing dates: 2nd & 3rd March **2016**

Representation

- Mr. Laurence Rabinowitz Q.C. and Mr. Colin West (instructed by Ince & Co LLP) for the appellant.
- Mr. John McCaughran Q.C. and Mr. Laurence Emmett (instructed by Herbert Smith Freehills LLP) for the respondent.

Judgment
Lord Justice Moore-Bick:

Background

This appeal turns on the construction of a few clauses in a contract for the hire of a semi-submersible **drilling** rig, ' *GSF Arctic III* '. It also raises some interesting questions about the freedom of two commercial parties to determine the terms on which they wish to do business.

On 15th April 2011 the owner of the rig, **Transocean Drilling U.K**. Ltd ("**Transocean**"), entered into a contract with Providence Resources Plc ("Providence"), to **drill** an appraisal well in an area of the Barryroe field off the southern coast of the Republic of Ireland. The contract, which contains many complex provisions, was based on a standard industry agreement known as the 'LOGIC' form, which the parties adapted to meet their particular needs.

On 18th December 2011 **drilling** operations were suspended as a result of the misalignment of part of the blow-out preventer. They resumed on 2nd February 2012 when the rig was able to continue work from the point at which it had been interrupted. The delay gave rise to various disputes between the parties, in particular, about the remuneration payable to **Transocean** in respect of what became known as the 'disputed period' and the right of Providence to recover additional overheads, known as 'spread costs', resulting from the extended period of work. At the heart of the dispute was the question whether the delay had been caused by one or more breaches of contract on the part of **Transocean**.

The judge found that the rig had not been in good working condition on delivery, contrary to the terms of the contract, because there had been a build-up of debris in a component of the blow-out preventer known as a 'stinger'. The defect caused a loss of time of over 27 days. He also found that an additional 10 hours' delay had been caused by the failure of a member of the crew to tighten a blanking plug properly. He held that **Transocean** was in breach of contract in both respects and there is no appeal against that part of the judge's conclusions. The judge held that in those circumstances Providence was entitled to recover spread costs for the period of delay, notwithstanding the terms of the contract on which **Transocean** relied as excluding any liability for losses of that kind. This is **Transocean's** appeal against that part of the judge's decision.

The structure of the contract

Before turning to the specific clauses on which **Transocean** relies, it may be helpful to say something

about the structure of this particular contract, which provides an important part of the context in which those clauses must be construed. The parties to the contract are described in the contract as 'the contractor' and 'the company'. Clause 4 sets out the contractor's general obligations, which include obligations to provide the rig in good working condition, maintain it and carry out the work with all due skill and care. By clause 13 the contractor was to be paid at daily rates set out in a separate section of the contract, which varied in accordance with the activities being undertaken at any given time. There was, for example, a 'Daily Operating Rate' payable while work was being carried out, a 'Standby Rate', a 'Moving Rate', a 'Repair Rate' (applicable when there was a shutdown of operations caused by a failure of the contractor's equipment) and so on.

Clause 18 is of particular importance, but for present purposes it is sufficient to note that by means of a complex series of indemnities it allocated losses arising from or relating to the performance of the contract between the two parties, in the main regardless of cause. Thus, by clause 18.1 the contractor accepted responsibility for loss of or damage to its own property, for personal injury to any of its employees and for similar loss and for damage suffered by third parties (i.e. persons other than the company) insofar as it might be caused by its own negligence or breach of duty. Similarly, by clause 18.2 the company accepted responsibility for loss and damage to its own property and employees and for loss and damage suffered by third parties (i.e. persons other than the contractor) as a result of its own negligence. By clauses 18.3 and 18.4 the company accepted responsibility for loss caused by pollution, other than pollution originating from the hull of the rig, for which the contractor accepted responsibility. By clause 18.5 the company undertook responsibility for damage to the property or equipment of the contractor which occurred while in-hole or below the rotary table, unless due to fair wear and tear or the contractor's negligence. Clause 18 contained other provisions of a similar kind relating to damage to the well, blow-outs, fires and explosions and damage to the geological formation and the marking and removal of any wreck or debris. Finally, it is necessary to mention clause 18.8 which expressly provided that the exclusions and indemnities for which clauses 18 and 20 provided were to apply irrespective of cause and notwithstanding the negligence, breach of duty or other failure of the indemnified party and irrespective of any claim that might otherwise arise in law.

By clause 19.1 the contractor was required to procure and maintain for the benefit of both parties a wide range of insurance cover as described in detail in clause 19.2.

Clause 20, to which it will be necessary to refer in detail at a later stage, contained mutual undertakings by the company and the contractor to indemnify each other against, and hold each other harmless from, its own consequential loss, as defined in that clause. Although couched in the form of an indemnity, it was common ground that its effect was to exclude liability for losses of that kind.

As can be seen from this brief summary of their provisions, clauses 18–20, which were clearly designed to complement each other, contained a detailed and sophisticated scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance. Sometimes called 'knock for knock' provisions, the scheme as a whole provides an important part of the context in which clause 20 is to be construed.

'Spread costs'

The spread costs which Providence sought to recover in these proceedings are described in the judgment below as the costs of personnel, equipment and services contracted from third parties which were wasted as a result of the delay. Examples given by the judge are well logging, well testing and cementing, mud engineers and mud logging services, geological services, diving and ROV (remotely operated vehicle) services, weather services, directional **drilling** services, and running casings. The claim was put in Providence's pleading as one to recover the wasted cost of third party equipment and services which had been supplied and paid for. They were described in its evidence as "costs of third party suppliers which have been incurred and paid by Providence, but which would not have been incurred but for **Transocean's** failures", but however they are described it is clear that the claim is to recover the cost of goods and services supplied by third parties which was wasted, either in the sense that Providence had no use for them while **drilling** was suspended or in the sense

that they did not contribute to the process of completing the well.

Clause 20– Consequential loss

In view of its central importance to the appeal it is necessary to set out clause 20 in full. It provided as follows:

> **Consequential Loss**
>
> For the purposes of this Clause 20 the expression "Consequential Loss" shall mean:
>
> (i) any indirect or consequential loss or damages under English law, and/or
>
> (ii) to the extent not covered by (i) above, loss or deferment of production, loss of product, loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties), loss of business and business interruption, loss of revenue (which for the avoidance of doubt shall not include payments due to CONTRACTOR by way of remuneration under this CONTRACT), loss of profit or anticipated profit, loss and/or deferral of **drilling** rights and/or loss, restriction or forfeiture of licence, concession or field interests
>
> whether or not such losses were foreseeable at the time of entering into the CONTRACT and, in respect of paragraph (ii) only, whether the same are direct or indirect. The expression "Consequential Loss" shall not include CONTRACTOR'S losses arising in connection with (1) failure by COMPANY to provide the letter of credit as required by Clause 3.13 of Section III or resulting termination of this CONTRACT or (**2**) any termination of this CONTRACT by reason of COMPANY'S repudiatory breach.
>
> Subject to and without affecting the provisions of this CONTRACT regarding (a) the payment rights and obligations of the parties or (b) the risk of loss, or (c) release and indemnity rights and obligations of the parties but notwithstanding any other provision of the CONTRACT to the contrary the COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from the COMPANY GROUP'S own consequential loss and the CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY GROUP from the CONTRACTOR GROUP'S own consequential loss."

Although the definition of "consequential loss" occupies the first, and longer, part of the clause, the operative part is contained in the second part, under which the contractor and the company each agreed to indemnify and hold the other harmless from its own consequential losses and thus to accept full responsibility for them. Together with clause 18, therefore, clause 20 represented an important element in the sophisticated allocation of losses between the two contracting parties.

The issue in this appeal is a short one: whether wasted spread costs incurred by Providence as a result of **Transocean's** breaches of contract are "consequential losses" within the meaning of clause 20. The terms of the clause, the nature of the costs and the circumstances in which they came to be incurred might all suggest

that they were, but the judge held otherwise as a result of the application of various principles which the courts have adopted over the years to assist in the construction of exclusion clauses. Mr. Rabinowitz Q.C. submitted that the judge had erred in applying those principles incorrectly and without having adequate regard to the words the parties had chosen to use. Mr. McCaughran Q.C., by contrast, submitted that the judge had approached the task of construction correctly and had applied well-established principles in an appropriate manner.

Although it was common ground below that clause 20 is an exclusion clause, it has certain characteristics which differ from a typical exclusion clause, by which a commercially stronger party seeks to exclude or limit liability for its own breaches of contract. In this case the parties are of equal bargaining power and have entered into mutual undertakings to accept the risk of consequential loss flowing from each other's breaches of contract. As I have already pointed out, the clause is to be seen as an integral part of a broader scheme for allocating losses between the parties. It is not, therefore, a simple exclusion clause of a kind which at one time the courts were willing to construe restrictively in order to avoid commercial oppression. In any event, since the decision in Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827 the courts have recognised that artificial approaches to the construction of commercial contracts are to be avoided in favour of giving the words used by the parties their ordinary and natural meaning. More recently the principle that the court should give the language used by the parties the meaning which it would be given by a reasonable person in their position furnished with the knowledge of the background to the transaction common to them both has received support from a series of decisions of the highest authority, from Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101 to Arnold v Britton [2015] UKSC 36, [2015] A.C. 1619 . Most recently the Supreme Court in Arnold v Britton has re-emphasised that particular importance must be given to the language chosen by the parties to express their intentions: see Lord Neuberger of Abbotsbury P.S.C. at paragraphs 15-20. For that reason, the starting point in construing clause 20 must be the language of the clause itself.

The expression "consequential loss" has caused a certain amount of difficulty for English lawyers, mainly as a result of attempts to define its meaning in the interests of commercial certainty: see the line of cases that includes Saint Line v Richardsons Westgarth & Co Ltd [1940] 2 K.B. 99 , Croudace Construction Ltd v Cawoods Concrete Products Ltd (1978) 8 B.L.R. 20 and Deepak Fertilisers Ltd v ICI Chemicals and Polymers Ltd [1999] Lloyd's Rep. 387 . It is questionable whether some of those cases would be decided in the same way today, when courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in different documents. The existence of that line of authority may account for the unusual terms of clause 20(i), but those cases do not fall for discussion in this case, which turns on the meaning to be given to clause 20(ii). Nor is it necessary to discuss whether the clause derogates from one or other or both limbs of the rule in Hadley v Baxendale , since the only question with which we are concerned is whether its language is apt to encompass the spread costs which Providence seeks to recover.

The critical words are:

> "…loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties), loss of business and business interruption … "

"Loss of use" naturally refers to the loss of the ability to make use of some kind of property or equipment owned or under the control of the contractor or the company, as the case may be, but in this case the parties have made it clear by the words in brackets that follow that its scope is intended to be wider than that. For example, it extends to the loss of use or cost of use of property, equipment and materials and to the loss of use or cost of use of services provided by contractors, sub-contractors and third parties. Moreover, it must be borne in mind that this forms part of the definition of losses which flow from (in this case) the contractor's breach of contract,

but are not the immediate consequence of it. The basis of Providence's claim to recover spread costs is that they represent the cost of goods and services that were obtained and paid for but were wasted as a result of the delay caused by **Transocean's** breach of contract. There has to be loss of some kind to engage clause 20 at all and the words "loss of use or the cost of use of property, equipment, materials and services … provided by contractors or subcontractors of every tier or by third parties" are plainly apt on the face of them to cover costs of that kind. Moreover, it is interesting to note the lengths to which the parties have gone to emphasise the width of the clause: twice within the same passage in brackets they have used the expression "without limitation" to make the point.

Mr. McCaughran's answer in part was to submit that the words "loss of use" which precede the words in brackets limit the scope of the words that follow, so that they must all be understood to refer only to loss of use in the ordinary sense. On that basis he submitted that the words in brackets are directed to the cost of equipment and services obtained to mitigate the effects of a breach of contract on the part of the contractor which has deprived the company of the use of equipment or services that would otherwise have been available to it. I am unable to accept that submission. In my view, the purpose of those words is to explain and expand the simple phrase "loss of use" by examples expressed in the widest possible way ("without limitation"). The mutual nature of clause 20 and its role as part of the provisions for allocating loss tell in favour of an intention to give the words a broad meaning. In my view the natural meaning of the words the parties have used is apt to include wasted spread costs.

The judge adopted a rather different approach to the construction of clause 20. Rather than first seeking to ascertain the natural meaning of the language, he began by accepting Mr. McCaughran's submission that the clause was to be construed *contra proferentem* and therefore against **Transocean**, despite the fact that it is a bilateral clause with mutual exclusions. He did so because, as he put it, "a party relying on an exclusion clause must establish that the words show a clear intention to deprive the other party of a remedy to which he would otherwise be entitled." In support of that proposition he relied on the well-known observation of Lord Diplock in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] A.C. 689 , 717H that there is a presumption that neither party to the contract intends to abandon any remedies for its breach which clear words are required to rebut.

In my view the judge was wrong to invoke the *contra proferentem* principle in this case. It is an approach to construction to which resort may properly be had when the language chosen by the parties is one-sided and genuinely ambiguous, that is, equally capable of bearing two distinct meanings. In such cases the application of the principle may enable the court to choose the meaning that is less favourable to the party who introduced the clause or in whose favour it operates. Unfortunately, it seems now to be used by some as synonymous with the principle in Gilbert-Ash , although the two are in fact quite distinct: see Nobahar-Cookson v The Hut Group Ltd [**2016**] EWCA Civ 128 per Briggs L.J. at paragraphs 12-20. It has no part to play, however, when the meaning of the words is clear, as I think they are in this case; nor does it have a role to play in relation to a clause which favours both parties equally, especially where they are of equal bargaining power. In the case of a mutual clause such as the present clause 20 it is impossible to say who is the proferens and who the proferee.

Nor, with respect, can I accept that resort to the *contra proferentem* principle can be justified by reference to Gilbert-Ash . Lord Diplock's observation must be read and understood in context. Their Lordships were concerned in that case with the question whether, by agreeing to pay the contractor against certificates issued by the architect under a building contract, the contractor had agreed to forego its right of abatement or set-off under the general law. Such rights have a particular importance and it is no doubt correct to presume that parties do not intend to give them up unless they have made that intention clear, but that is to say no more than their intention to do so must be apparent from the language they have used, fairly construed. Since the decision in Photo Production any presumption that parties to a contract do not intend to give up their right to claim damages for breach of contract must likewise give way to the language of the contract. In any event, it is clear that in agreeing to clause 20 in this case the parties did intend to give up some of their rights; the only question for decision is whether Providence intended to give up its right to

recover damages in the form of wasted or additional spread costs.

The decision in E. E. Caledonia Ltd v Orbit Valve Co. Europe [1994] 1 W.L.R. 1515 , on which the judge also relied, is in my view of no assistance in construing clause 20. The primary question in that case was whether a clause allocating liability for death or personal injury contained mutual indemnities in respect of losses caused by negligence. The court held that it did not, applying the well known test in Canada Steamship Lines Ltd v The King [1952] A.C. 192 . However, the fact that even in a clause providing mutual indemnities it is presumed that parties did not intend to release each other from the consequences of negligence does not in my view take the matter any further. It is a different question and one which does not arise in this case.

The judge next referred in paragraph 163 of the judgment to the fact that sub-paragraph (ii) of clause 20 contains, as he put it, "a specifically defined incursion into the territory of the first limb of Hadley v Baxendale " and should therefore be construed narrowly to limit its scope to specific categories of loss narrowly defined rather than being treated as a widespread redefinition of excluded loss. It is not clear to me, however, why the nature of the clause calls for a narrow construction in order to limit its scope. Such an approach would be appropriate only if there were grounds for seeking by means of construction to reduce the scope of the clause beyond that which the parties had agreed. As I have already said, however, the court's task is not to re-shape the contract but to ascertain the parties' intention, giving the words they have used their ordinary and natural meaning.

In paragraphs 164 and 165 the judge expressed the view that the expression "loss of use" was more naturally to be read as connoting the loss of expected profit or benefit to be derived from the use of property or equipment, a conclusion, he said, which gained strength and colour from the application of the *eiusdem generis* principle to the other identified types of loss. However, I think that Mr. Rabinowitz was right in saying that this was not a proper case for the application of the eiusdem generis principle of construction, by which general words may be given a limited meaning when they follow a list of specific matters (often causes or events) which can be seen to be of a similar kind. The judge was of course right to construe the expression in the context of the sub-paragraph as a whole. I accept that standing alone the expression "loss of use" might well refer to a loss of expected profit or benefit to be derived from the use of property or equipment, but in this as in other cases its meaning is shaped by its context. I think, with respect, that the judge failed at that point to have sufficient regard to the words in brackets which follow the expression "loss of use" or to recognise that the purpose of providing specific examples is to flesh out its meaning.

In paragraph 166 the judge dealt with the expression "cost of use", which appears as part of the words in brackets. He held that the expression covers the cost of hiring in equipment or services, or replacing property, the use or benefit of which had been lost, in order to mitigate that loss and had no application to spread costs where those costs had been incurred for equipment and services which had been provided. He found that Providence had not lost the use of the equipment or services in respect of which spread costs had been incurred, which remained available to it. That was why it had incurred wasted expenditure in paying for them. I have not found this part of the judgment entirely easy to understand, but the judge seems to be saying that because the expression "cost of use" is an example of "loss of use", its meaning is governed by the latter and that it is therefore limited to costs incurred in consequence of, and in order to mitigate, the loss of use of some other property or equipment. This is the point made by Mr. McCaughran to which I referred earlier. However, clause 20 contains no reference to mitigation and the construction adopted by the judge is in my view strained. As I have already said, I think it is wrong to treat the words in brackets as limited by the general expression; their purpose is clearly to explain and amplify the meaning of that expression. Moreover, the expression "cost of use" itself cannot be construed in isolation. It forms part of the wider expression " loss of use or the cost of use of property, equipment … etc.". This reads in a slightly odd manner, but is, I think, to be construed as if it read "loss of use or [of] the cost of use of property, equipment … etc." The purpose of sub-paragraph (ii) is clearly to catch consequential losses of all kinds and one obvious example of consequential loss is expenditure on goods or services from which no benefit can be obtained.

This brings me to the argument which the judge dealt with in paragraphs 167-168 of his judgment and on which Mr. McCaughran placed particular emphasis, namely, that, if clause 20 is given the meaning for which **Transocean** contends, it effectively denudes the contract of any meaningful obligations as far as **Transocean** is concerned, so that it becomes, in the words of Lord Wilberforce in Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361 , "a mere declaration of intent." That, it is said, is a powerful indication that the parties did not intend the clause to have that meaning.

The principle to which the judge referred has been recognised and applied in a number of cases, including Tor Line A.B. v Alltrans Group of Canada Ltd (The 'T.F.L. Prosperity') [1984] 1 W.L.R. 48 and Kudos Catering (**UK**) Ltd v Manchester Central Convention Complex Ltd [2013] EWCA Civ 38, [2013] **2 Lloyd's Rep**. 270 , both of which were drawn to our attention. However, it should be seen as one of last resort and there is authority that it applies only in cases where the effect of the clause is to relieve one party from all liability for breach of any of the obligations which he has purported to undertake: see Great North Eastern Railway Ltd v Avon Insurance Plc [2001] EWCA Civ 780, [2001] **Lloyd's Rep**. I.R. 793 . Only in such a case could it be said that the contract amounted to nothing more than a mere declaration of intent.

I fully accept that where the language of an exclusion clause leaves room for doubt as to its meaning, the principle applied in these cases may provide a valuable tool for ascertaining its correct meaning and in some cases it may lead to the conclusion that a restricted meaning must be given to the clause in question in order to achieve the parties' common objective. But it does not in my view provide sufficient justification for overriding the parties' intention where that has been clearly expressed. The principle of freedom of contract, which is still fundamental to our commercial law, requires the court to respect and give effect to the parties' agreement. One of the striking features of this contract, to which I have already adverted, is the extent to which the parties have agreed to accept responsibility for losses that might otherwise have been recoverable as damages for breach of contract. If, as a result of incorporating several different provisions of that kind, the parties have effectively agreed to exclude any liability for damages for any breaches, it is difficult to see why the court should not give effect to their agreement.

Mr. McCaughran suggested two answers to that question. The first was that if an exclusion clause (alone or in conjunction with other terms of the contract) effectively excluded liability for all breaches of the contract, the agreement would have no legal content and could not be regarded as legally enforceable at all, the implication being that since the agreement is expressed to be a contract, the parties cannot have intended that result. He based that argument on a passage in the speech of Lord Diplock in Photo Production v Securicor at pages 850E-851C, in which his Lordship stated that parties to a contract 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." In saying that, however, his Lordship may simply have been pointing out that an agreement devoid of legal obligations is not enforceable as a contract.

Mr. McCaughran's second answer was that the court can disregard a clause which effectively relieves a party from liability for any breach of the contract. He was unable to point to any authority for that proposition, however, which is at odds with the concept of party autonomy and the principle of freedom of contract, since it involves making for the parties an agreement which they did not themselves make. The freedom of parties to make unreasonable agreements was recognised by Lord Diplock in Photo Production v Securicor in a passage in his speech at page 851A in which he said that, although the court's view of the reasonableness of construing an exclusion clause in one way rather than another is a relevant consideration in deciding what meaning the words were intended to bear, that does not entitle the court to reject the clause, however unreasonable the court itself may think it, if the words are clear and fairly susceptible of one meaning only.

However, although these are interesting questions, it is unnecessary to decide them in the present case, because I am unable to accept that clause 20 has the very wide consequences suggested by Mr. McCaughran. In the first place, there is a distinction to be drawn for this purpose between a clause which purports to relieve

one party from all liability for breach of any of its obligations and a clause which excludes all liability for certain kinds of loss and damage. In the former case there may well be a dispute about the true scope of the clause, whereas in the latter the court is concerned to identify the kind of loss to which the clause applies. Tor Line v Alltrans was an example of the former. The issue was whether the general language of the exclusion clause ("The owners not to be responsible in any other case … ") was apt to encompass a breach of the vessel's description which rendered her unfit for the charter service. Not surprisingly, the House of Lords held that it did not, because it was not clear that the parties had agreed to relieve the owners of liability for a breach of contract of that kind.

In Kudos Catering v Manchester Central Convention Complex the court was concerned with the termination by the defendant of a contract under which the claimant had been granted the exclusive right to provide catering services at premises operated by the defendant. The claimant had treated the termination of the contract as amounting to a repudiation by the defendant and sought to recover damages in respect of the profit which it alleged it would have made during the remaining life of the contract. In response the defendant sought to rely on a clause which purported to exclude any liability whatsoever "in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits … or indirect or consequential loss suffered by the Contractor or any third party in relation to this agreement." Tomlinson L.J., with whom Laws and McCombe L.JJ. agreed, held that the reference to losses suffered by third parties, coupled with an agreement by the defendant to indemnify the claimant against liability for damage to property caused by its negligence, indicated that the clause was intended to apply to defective performance but not to a repudiatory breach. In that case also, therefore, the court was concerned with the nature of the breach to which the clause applied rather than with the nature of the losses to which it referred.

Mr. McCaughran submitted that, if **Transocean** were right, clause 20 applied to every conceivable kind of loss in such a way as to relieve **Transocean** from all liability for loss and damage whatever the nature of the breach. As a result there was some debate in the course of argument about whether the clause enabled **Transocean** to repudiate the contract with impunity for purely commercial reasons before the rig had even been delivered into service. That question does not arise for decision in the present case, but if necessary I would hold that clause 20 does not contemplate a deliberate repudiation of that kind (see, for example, A Turtle Offshore S.A. v Superior Trading Inc. (The 'A Turtle') [2008] EWHC 3034 (Admlty), [2009] 1 **Lloyd's Rep**. 177) and there may be other breaches on the part of one or other party to which similar considerations would apply. However, that can scarcely affect the meaning of the expression "loss of use or cost of use of property … etc." as it applies in those cases in which it does apply.

The issue that arises in the present case is of the second of the two kinds mentioned earlier, being concerned with identifying the kind of loss to which the clause relates rather than with the nature of the breaches of contract which the clause as a whole covers. In this context it is necessary to bear in mind that earlier in his judgment at paragraph 141 the judge had held that a claim by **Transocean** for hire during periods when the rig was out of action as a result of its own breach of contract failed for circuity of action. That can only have been on the basis that Providence was entitled to recover damages for a breach of the obligation to deliver and maintain the rig in good working order. On that footing it seems to me impossible to say that clause 20 effectively deprived the contract of all legal content.

Quite apart from that, however, this contract contained many obligations relating to the performance of the work and important mutual undertakings relating to the manner in which any loss or damage arising from events occurring in the course of the work should be borne. In such a case it cannot be said that the contract is devoid of legal content just because the parties have agreed that neither should be entitled to recover from the other consequential, as opposed to direct, loss. Accordingly, I see no reason in principle why the court should not give effect to clause 20 in accordance with its terms. The judge appears to have considered that he was entitled, if not obliged, to adopt a restricted construction of clause 20 in order to ensure that **Transocean's** various undertakings in the contract, including those relating to the condition and maintenance of the rig, had some legal content, but beyond holding that it did not extend to cover spread costs he did not seek to identify its true limits. That

suggests to me that the court was making for the parties an agreement which they had not themselves chosen to make. I can see no reason in principle why commercial parties should not be free to embark on a venture of this kind on the basis of an agreement that losses arising in the course of the work will be borne in a certain way and that neither should be liable to the other for consequential losses, however they choose to define them. In my view the language of clause 20 is clear and is apt to exclude liability for wasted costs in the form of the spread costs which Providence seeks to recover in this case.

Clause 13.6– set-off

Before the judge Providence argued that even if it were wrong about the construction of clause 20, it was entitled to recover spread costs by setting them off against hire pursuant to clause 13.6 of the contract.

The material parts of clause 13 provided as follows:

> "13.6 If the COMPANY disputes any items on any invoice in whole or in part or if the invoice is prepared or submitted incorrectly in any respect, the COMPANY shall return a copy of the invoice to the CONTRACTOR advising the CONTRACTOR of the reasons and requesting the CONTRACTOR to issue a credit note for the unaccepted part or whole of the invoice as applicable. The COMPANY shall be obliged to pay the undisputed part of a disputed invoice in accordance with the provisions of Clause 13.5.
>
> If any other dispute connected with the CONTRACT exists between the parties the COMPANY may withhold from any money which becomes payable under the CONTRACT the amount which is the subject of the dispute …
>
> On settlement of any dispute the CONTRACTOR shall submit an invoice for sums due and the COMPANY shall make the appropriate payment in accordance with the provisions of Clause 13.5.
>
> 13.7 Neither the presentation nor payment nor non-payment of an individual invoice shall constitute a settlement of a dispute, an accord and satisfaction, a remedy of account stated, or otherwise waive or affect the rights of the parties hereunder."

Since he held that clause 20 did not extend to liability for spread costs, the judge did not need to decide whether Providence was entitled to recover them by way of set-off, but he indicated that, if he had come to a different conclusion, he would have rejected that argument on the grounds that there can be no set-off in the absence of a recoverable claim.

Mr. McCaughran submitted that clause 13.6 encapsulates the right of equitable set-off under the general law and that clause 20, which states that the clause is subject to the payment rights and obligations of the parties, preserves that right and accords it priority over the undertaking to indemnify. Accordingly, Providence was entitled to set off its claim for damages arising from **Transocean's** breach of contract, following which there was no loss in respect of which it could indemnify **Transocean**.

This is an ingenious argument, but one which I am unable to accept. In the first place, clause 13.6 does not give rise to substantive rights; it merely provides machinery under which the company can withhold disputed sums pending resolution of the dispute. That much is clear both from the language of the final sub-paragraph of the clause and from the terms of clause 13.7, which makes it clear that non-payment of an invoice does not affect the parties' rights. Only

if and to the extent that the dispute is ultimately resolved in favour of the company can it be said that the withholding of the sum in question has effectively discharged the debt due. Clause 20, on the other hand, does give rise to substantive rights, so there can be no question of the right to withhold payment under clause 13.6 being given priority over the right of indemnity.

Viewed purely in terms of equitable set-off, however, the position is no better. The doctrine of equitable set-off is essentially procedural in nature, equity refusing to allow a claim at law to be enforced without taking into account a cross-claim closely connected with the subject matter of the claim. It follows that in order to take advantage of the doctrine it is necessary for the defendant to have a right to recover a sum of money, whether in the nature of debt or damages, from the claimant. In the present case the effect of clause 20 is to eliminate any such right Providence would otherwise have had to recover consequential losses from **Transocean**. In any event, if Providence could recover its spread costs from **Transocean** by setting them off against its liability for hire, it would still be liable under clause 20 to indemnify **Transocean** in respect of them. I have no doubt that the judge was right to reject this argument.

Conclusion

For all these reasons I would allow the appeal.

Lord Justice McFarlane:

I agree.

Lord Justice Briggs:

I also agree.

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