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KEY CONTRACT CASES LEARNINGS FROM 2014

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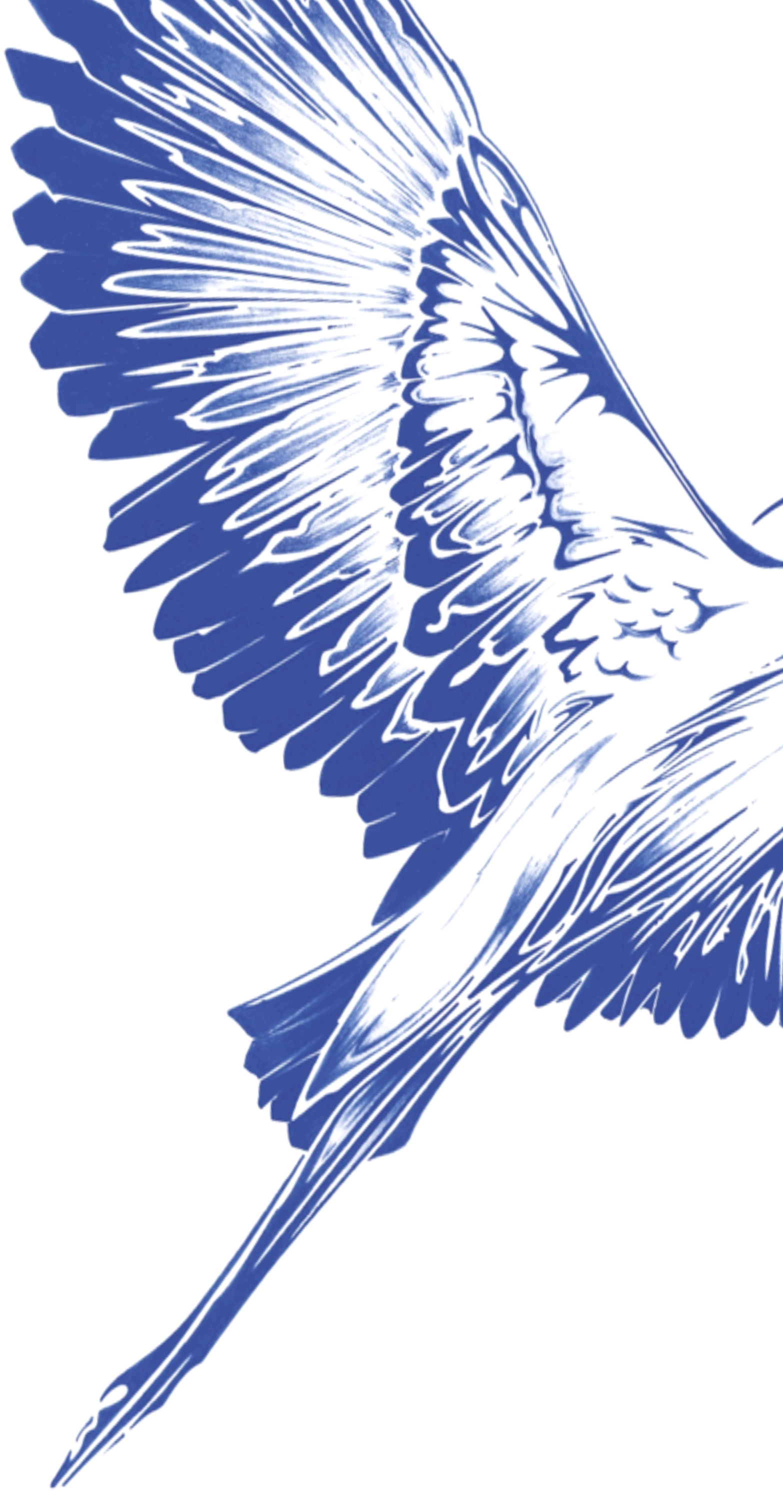

Case	Background & Key Principles	Drafting Tip
NAPIER PARK EUROPEAN OPPORTUNITIES FUND LTD V HARBOURMASTER PRO-RATA [2014] EWCA CIV 984	Harbourmaster issued 14 classes of collaterised loan obligations on an underlying portfolio of loans. The senior notes got downgraded from an AAA rating in 2010 and then upgraded to AAA again in 2012. At the end of 2013 a dispute arose between the senior noteholders and the junior noteholders as to whether a significant sum received as a result of prepayment of the underlying loans should be reinvested or paid out to the senior noteholders. Reinvestment was only permitted if: *"the ratings of [the senior notes] have not been downgraded below their Initial Ratings".* The senior noteholders wanted the prepayment to be paid out to them and argued that the requirement for reinvestment was not satisfied. The issue in question was whether after the change of ratings the notes were to be considered as downgraded, for the purpose of satisfying the above test, even though they had been upgraded back to their initial rating. The Court of Appeal held that the notes should not be considered as downgraded as at the time of prepayment the notes were rated AAA. It was considered that such an interpretation is in line with business common sense and the approach was taken that the current rating of the notes should be considered, not their rating history. **Principle:** In this case, there was ambiguity as to whether the rating of the senior notes was to be assessed at the time of the prepayment, or if previous downgrades should be taken into account for the purposes of assessing if reinvestment was permitted. In such cases the courts will interpret such ambiguities in line with business common sense; meaning that the current commercial reality of things will be taken into	• Avoid ambiguous wording when drafting a contract. Ambiguous wording will give further scope to differing views on interpretation and will increase uncertainty. Aim to always capture all circumstances and variations of a given situation. For example, if in the Napier case it had been specified whether the note downgrade should be looked at retrospectively, or would only be relevant at the time of reinvestment, there wouldn't have been confusion around the requirement.

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	account rather than values that are no longer applicable. Hence, the clause was to be read as applying at the time of the prepayment.	
MARKS & SPENCER PLC V BNP PARIBAS SERVICES TRUST CO (JERSEY) LTD [2014] EWCA CIV 603	BNP Paribas let a property to M&S on a lease that provided for rent to be paid in advance at the start of every quarter. M&S exercised a break clause a month after paying the quarterly rent, and argued that there was an implied term to recover the rent that had been paid in advance for the "unused" portion of rent. The Court of Appeal held that in this case no such implied term existed. The Court found that the loss from the payment of rent for the period after the break date should remain as is and should not be reimbursed. There was no implied term for repayment. **Principle:** It was held by the Court that it would have been obvious to the parties before they signed up to the lease that it was possible that rent would have to be paid on the last quarter day in full for a period that went beyond the break date.	• Avoid reliance on implied provisions. The intentions of the parties should be expressly reflected in the contractual wording and should aim to cover all possible outcomes/circumstances. • Consider all possible future events when drafting.
RWE NPOWER RENEWABLES LTD V J N BENTLEY LTD [2014] EWCA CIV 150	RWE engaged JNB to carry out civil engineering work. The contract between the parties split the work into three sections and provided that some of the tender documents were "deemed to form and be read and construed" as part of the contract. The contract also included a priority of documents clause ranking the	• When drafting a priority of documents clause ensure to take into account the fact that courts will only refer to the priority clause in relation to differences in provisions that are regarding the same subject. If the clauses are not about the same subject and not

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	other documents in order of precedence. As a result of perceived inconsistencies and ambiguities between the documents, a dispute arose between the parties as to whether some of the engineering work had to be completed as part of the second section of the works. If the work was to be part of section 2, JNB would not be held to have met the specified completion date for that section and would liable for liquidated damages. JNB argued that there was a clear and irreconcilable difference between two of the documents forming part of the contract as to what was required for the completion of section 2. Given the differences between the two documents, JNB argued that the precedence provisions should be interpreted so that the document most favourable to it will take precedence, in other words claiming that the provisions were irreconcilable. The Court of Appeal held that the differences between the two provisions were not substantial and that the inconsistency between the two documents could be resolved by looking at other parts of the contract. Therefore the precedence provisions did not apply. **Principle:** even if there is a genuine discrepancy between the contract documents (which did not actually exist in this case), the order of precedence was intended to resolve discrepancies relating to individual obligations rather than forcing the reader to choose between one entire clause and another. An order of precedence clause should only be used so far as different provisions imposed different obligations in relation to the same subject and not simply to force one set of documents to take precedence over another.	inconsistent, the priority clause will not come into play and the provisions will not supersede each other.
VIRULITE LLC V VIRULITE	In 2006 LLC and VDL entered into an agreement that permitted	• When drafting, include a variation clause in the

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DISTRIBUTION LIMITED [2014] EWHC 366 (QB)	LLC to market and sell a device for treating cold sores in North America. There was a variation clause in the contract that required any variation to be signed and in writing. The parties agreed to a variation orally regarding some of the payments that were due under the agreement, such that they were to be paid in instalments rather than in full, resulting in a variation to the agreement without the variation clause being followed. Not long after, one of the parties made an objection to the new payment structure on the basis that no variation had taken place. The Court of Appeal held that the oral variation was effective as the parties had intended it to be so at the time. **Principle:** Oral variation was effective as it was clear that in practice, the parties were content not to follow the requirement for variations to be recorded in writing.	contract to govern the possible methods in which the contract may be varied. However, bear in mind that a written variation requirement will not always prevail over oral variation if it is clear that the intention of both parties is to vary the agreement based on an alternative arrangement (i.e. oral agreement). • For the purpose of certainty ensure that you always follow the contractual variation procedures as drafted.
TOPLAND PORTFOLIO NO. 1 LTD V SMITHS NEWS TRADING LTD [2014] EWCA CIV 18	Topland granted a lease to a subsidiary of Smiths. Smiths were a party to the lease as guarantor of its subsidiary. Topland subsequently granted a licence to Smiths authorising certain alterations to the property that amounted to a variation of the lease. Smiths were not a party to the licence and had not consented to it. Smiths went into administration and the administrators disclaimed the lease. Topland gave notice to Smiths requiring it to pay all sums owing and to take a new lease for the remainder of the term. Smiths claimed that its liability under the guarantee was discharged when the licence was granted. The Court of Appeal held that Smiths' claim was successful. **Principle:** a guarantor's liability is discharged if the underlying	• When drafting varying guarantee provisions ensure that the guarantor is a party to the variation or has given consent in regards to the variation. • When drafting a variation clause ensure to take into account all possible outcomes.

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	contract is varied in any way unless the guarantor has agreed to the variation or the variation is clearly insubstantial or incapable of adversely affecting the guarantor. (Upheld Holme v Brunskill)	
POLYPEARL LTD V E.ON ENERGY SOLUTIONS LTD [2014] EWHC 3045 (QB)	Polypearl claimed that E.On was in breach of a contractual obligation to take a minimum quantity of products and claimed for loss of profit. Exclusion clause: "*Neither party will be liable to the other for any indirect or consequential loss, (both of which include, without limitation, pure economic loss, loss of profit, loss of business, depletion of goodwill and like loss) howsoever caused".* The High Court held that the wording of the clause was not sufficient to exclude liability for direct loss of profits. **Principle:** The reference to loss of profits in the brackets was subordinate to the phrase "indirect or consequential loss".	• When excluding liability for loss of profit ensure to include a clear, specific and express statement to reflect the exclusion of liability for loss of profit. • Ensure that some of the intended exclusions are not subordinate to others as this might not achieve the intended objective and scope of the exclusions clause.
FUJITSU SERVICES LIMITED V IBM UNITED KINGDOM LIMITED [2014] EWHC 752 (TCC)	IBM contracted with the Driver and Vehicle Licensing Agency to provide IT services, some of which were sub-contracted to Fujitsu. Exclusion clause: *"Neither Party shall be liable to the other under this Sub-Contract for loss of profits, revenue, business, goodwill, indirect or consequential loss or damage"* Fujitsu claimed that IBM breached the sub-contract and claimed for loss of profit.	• When excluding liability for loss of profit ensure to include a clear, specific and express statement to reflect the exclusion of liability for loss of profit specifically as its own separate category of loss. Consider the difference between the exclusion clauses in the Polypearl and Fujitsu cases. For the purpose of drafting it is not necessary to always specify direct or indirect loss as it might give a narrow scope of exclusion, rather use entire heads

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	The High Court held that the exclusion clause operated to exclude liability for all loss of profits, whether direct or indirect. **Principle:** The parties were sophisticated commercial parties of equal bargaining power at arm's length, and the clause was tailor made to both parties. The exclusion clause was clear and unambiguous and rebutted the presumption that parties do not intend to abandon remedies arising by operation of law.	of loss as their scope is broader.
TRANSOCEAN DRILLING UK LIMITED V PROVIDENCE RESOURCES PLC [2014] EWHC 4260 (COMM)	Providence hired one of Transocean's drilling rigs to conduct drilling operations. The drilling operations got interrupted by substantial delays due to problems with the rig, and as a result Providence incurred significant spread costs (third party expenditure). Providence withheld payment of some of Transocean's invoices. Providence defended this claim on the basis that Transocean was in breach of contract in providing a rig that was not fit for purpose and also counterclaimed for the spread costs it had incurred during the periods of delay. Transocean argued that Providence's spread costs were excluded by virtue of the exclusion of consequential loss in the contract, which was based, in part, on an oil and gas industry standard form. The definition of consequential loss under their contract comprised two limbs; the first limb was *"any indirect or consequential loss or damages under English law"*; the second limb was: *"loss or deferment of production, loss of product, loss of use ..., loss of business and business interruption, loss of revenue, loss of profit or anticipated profit, ..."* It was held that Transocean was in breach of contract and was not entitled to recover amounts invoiced for periods where the	• When seeking to exclude liability for losses, this should be done as a separate sub-clause for each type of loss in order to most accurately and clearly express the intentions of the parties and to enforce certainty of contract.

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	delay was caused by its own breach of contract. **Principle:** loss of use was to be read as connoting the loss of expected profit or benefit to be derived from the use of the drilling rig, and did not therefore exclude Providence's spread costs.	
BRISTOL GROUNDSCHOOL LIMITED V INTELLIGENT DATA CAPTURE LIMITED [2014] EWHC 2145 (CH)	BGS and IDC collaborated on producing electronic training manuals for commercial airliners. They had two agreements in place for this. BGS sued IDC for breaching one of the agreements by failing to provide technical support and refusing to include new materials in the manuals.. However, BGS had also downloaded materials from IDC's IT systems without authorisation and IDC counterclaimed that there was an implied duty of good faith that was breached by BGS from the unauthorised downloading. The case of Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] in which an implied duty of good faith in distribution agreements was established was considered and followed by the Courts. The High Court held that BGS's unauthorised downloading of material was commercially unacceptable and therefore BGS was in breach of the implied duty of good faith. **Principle:** Good faith *"extends beyond, but at the very least includes, the requirement of honesty"*. The relevant test is whether the conduct in question would be regarded as commercially unacceptable by reasonable and honest people in the particular context involved.	• 'Good faith' obligations should be expressly addressed when drafting contacts in order to avoid situations of uncertainty. • Consider limiting good faith obligations where appropriate.

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AODHCON LLP V BRIDGECO LIMITED [2014] EWHC 535 (CH)	Bridgeco provided a loan to Aodhcon. The loan had a facility fee of 1.25% per month payable on redemption of the loan. The contract for the loan also provided the following: *"[Bridgeco] will waive [its] right to collect the Facility Fee if there are no arrears of interest or any other breaches of the terms and conditions set out in this offer letter or of the terms of the security including ... failure to repay the loan at the end of the term."* Dispute arose whereby Bridgeco sought full payment of the facility and Aodhcon argued that the facility fee was a penalty and therefore unenforceable. It was held that facility fee did not impose any additional liability in the event of default and therefore could not be a penalty **Principle:**. If the facility does not impose any additional liability in the event of default it could not be a penalty. The fact that the facility fee claimed was a large amount was irrelevant. There was also nothing in this case to suggest that the predominant contractual function of the facility fee provision was to deter Aodhcon from breaching the loan agreement.	• When drafting provisions that might require future payment by one or both parties to a contract, always consider whether the clause has a trigger event other than breach of contract. If there is no trigger, other than simply breach of contract, they are highly likely to be classified as a penalty clause.
UNAOIL LTD V LEIGHTON OFFSHORE PTE LTD [2014] EWHC 2965 (COMM)	The issue was whether a payment was an enforceable liquidated damages payment or an unenforceable penalty. Leighton tendered for onshore works on pipeline in Iraq and entered into a subcontract with Unaoil, where if Leighton was successful Unaoil would be their subcontractor. There was a penalty to pay $40m in liquidated damages to Unaoil if they didn't get the tender. The agreement expressly stated that the sum was proportionate and a genuine pre-estimate of Unaoil's likely loss. Original price of works was $75m but was later	• When varying a contract always consider whether any damages provisions will remain proportionate after the variation, if not, they could be considered a penalty and hence unenforceable.

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	reduced (amended) to $55mil. Leighton got the tender but didn't take Unaoil as subcontractor. Unaoil sued for the 40m. It was held that the provision was penal in nature and unenforceable. **Principle:** The question of whether a clause is penal or not is to be determined by reference to the facts as known at the date of the relevant contract (in this case on the date of amendment). The $40m was out of proportion to any stipulated loss after the reduction of the price. The Court found that the sum was "*on any objective view, "extravagant and unconscionable with a predominant function of deterrence" without any other commercial justification*".	
BARCLAYS BANK PLC V UNICREDIT BANK AG [2014] EWCA CIV 302	Barclays provided guarantees in respect of a portfolio of Unicredit's loans in return for a quarterly fee. Unicredit had an option to terminate the guarantees in the event of regulatory changes, subject to Barclays' consent which was to be determined in a "commercially reasonable manner". Barclays believed that there was a mutual understanding that if Unicredit were to exercise the option to terminate the guarantees, it would pay Barclays five years' worth of fees before consent would be given. When the situation arose Unicredit refused to pay the fees and terminated the guarantees. Barcays claimed that the guarantees had not been validly terminated as they withheld their consent. It was held that Barclays withheld consent in a commercially reasonable manner and the guarantees had not been validly terminated. **Principle:** It is the manner of the determination, not the	• When drafting, consider that there will be an objective standard of reasonableness to be applied to any phrases that give discretion to either of the parties in the case of dispute.

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	outcome, which must be commercially reasonable. Barclays could prefer its own interests to those of Unicredit, as *"any commercial man whose consent to a course of action is required but to whom the determination (whether to give that consent) is entrusted would think it commercially reasonable to have primary regard to his own commercial interests."* *"the party who has to make the relevant determination will not be acting in a commercially reasonable manner if he demands a price which is way above what he can reasonably anticipate would have been a reasonable return from the contract"*	
TULLOW UGANDA LTD V HERITAGE OIL AND GAS LTD [2014] EWCA CIV 1048	Under a tax indemnity in a share purchase agreement, Heritage agreed to indemnify Tullow in respect of all taxes arising from the transaction. Tax demand arose but Heritage disputed Tullow's right to be indemnified on the grounds that Tullow had failed to give notice of the tax demand, as required under SPA, as Tullow gave notice one day later. It was claimed that the following provision was a condition precedent and it had not been complied with: *"Upon the Indemnified Party becoming aware of any Tax Claim being made to which the indemnities ... may apply, that Indemnified Party shall ... within 20 (twenty) Business Days, give notice in writing of the Tax Claim to the Indemnifying Party..."* The Court of Appeal held that the disputed provision was not a condition precedent for the following reasons: • another indemnity in the contract expressly stated that the indemnity would "*not apply unless notice of the Indemnified Party's claim or demand ... is given to the Indemnifying Party*". The conduct of claim provisions for a tax claim did not	• In order to avoid situations of unnecessary dispute and complexity, when drafting any boilerplate provisions, such as a notice provision, ensure that they do not create any hurdles for the performance of the contract on a trivial basis. Even though the courts would in some circumstances, as was the case in Tullow, seek to promote good business relationships and not allow formalities to be of detriment to an agreement, this might not always be the case.

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	include any such words; and • it was clear that the parties did not intend to remove a right because of a trivial breach such as service of notice a day later than stipulated. The Court of Appeal considered that taking such a view would be against commercial sense. **Principle:** The parties did not intend to remove a right because of a trivial breach such as service of notice a day later than stipulated. CoA highlighted the general reluctance to classify clauses as conditions precedent as it may have a depriving effect on a party in respect of their contract rights because of trivial breaches which have little or no prejudicial effect on the other and causes the other little or no loss.	
T&L SUGARS LIMITED V TATE & LYLE INDUSTRIES LIMITED [2014] EWHC 1066 (COMM)	The issue in question was whether claims under a share and business sale agreement had been served in time in accordance within the meaning of the following clause: *"Any claim ... shall ... be deemed to be irrevocably withdrawn 12 months after [notice of the claim is given] ... unless at such time legal proceedings in respect of the relevant claim have been commenced by being both issued and served."* The relevant 12-month period expired on 30 March 2013 (the Saturday before Easter). On Wednesday 27 March the sealed claim form and particulars of claim were delivered by hand to the offices of the defendant's solicitors (who were instructed to accept service). The question was whether they had been 'served' by 30 March. In particular, the courts needed to examine whether 'serve' has its legal meaning under Civil Procedure Rule ("**CPR**") 7.5 or ordinary meaning (as they differed).	• When drafting notice provisions ensure that the notice procedure is as clearly stated as possible, in light of different possible interpretations of the wording.

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	It was held that "issued" and "served" had the meanings as specified under CPR, rather than some ordinary non-legal meaning and therefore the claim forms were considered not to have been served in time for the purpose of the agreement. **Principal:** In respect of business agreements, the legal meaning of a term will take precedence over the term's ordinary meaning. In contrast, in the case of Ageas (UK) Ltd v Kwik-Fit (GB) Ltd 2013 the judge decided that *"served"* bore the ordinary meaning of *"delivery upon, and receipt by, the intended recipient"*.	
CHRISTOPHER BRIGGS V GLEEDS (HEAD OFFICE) [2014] EWHC 1178 (CH)	The case concerned a pension scheme for employees of partnerships and companies within Gleeds group. The context for the issues arising was regarding significant amendments to the scheme over time. Those amendments included the introduction of a money purchase section for new joiners, a later cessation of all future final salary accrual and purported breaking of the link to future pay rises, and changes to eligibility for membership of the scheme. Questions were raised by the scheme members over all of those amendments and others and their validity, which the members sought to deny. The changes implemented by the pensions scheme were conducted through some 30 documents (some of which from as far back as 1991) that were expressed to be deeds but had not been validly executed as deeds. The deeds hadn't been witnessed, but were compliant with all other requirements for the valid execution of a deed. Gleeds tried to argue that the scheme members were estopped from denying that the deeds were validly executed based on the fact that they had been in place for such a long period of time. If the scheme members could prove that the deeds were invalid on the basis that they were defective, the	• Ensure that all necessary formalities are properly followed for the purpose of executing documentation in accordance with any applicable requirements. Courts will rarely make exceptions to them and this might negatively impact a party's business arrangements.

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	pension scheme would have tens of millions of pounds being added to its liabilities that the Gleeds partners will have to fund. The judge concluded that estoppel cannot be invoked to circumvent the formal, statutory requirements for the execution of a deed under the Law of Property (Miscellaneous Provisions) Act 1989. It was held that the deeds had not been validly executed and that the scheme members could therefore deny their validity. **Principle:** Estoppel cannot be invoked to circumvent statutory requirements.	

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