Welcome to the latest bulletin from Bristows’ Commercial Disputes team. This bulletin has been prepared by the Technology Disputes group within the team, which is led by Kevin Appleton. This month, Legal Eye is edited by Angela Fouracre and Tom Ohta.

Should you have any comments on this bulletin, we would be delighted to hear from you. Please click HERE to email your comments to us.

Brought to a standstill: interim injunctions and confidential information

Tom Ohta

Europe’s largest automobile manufacturer, Volkswagen, has secured an interim injunction preventing the publication of certain parts of an academic paper about a weakness in an algorithm used in its car immobilisers.[1] This case highlights how the law of confidence and injunctive relief can be used to protect commercially sensitive materials and information which cannot otherwise be protected by intellectual property rights such as patents.

Interim court proceedings were initiated when a number of academic experts in cryptography and their employers (academic institutions) sought to publish certain parts of an academic paper concerning the technology behind car immobilisers.

The academic paper was based on a review of a software programme obtained from “murky” origins namely, via the internet, and which contained an encrypted algorithm used in car immobilisers fitted in Volkswagen cars. Having identified a weakness in the algorithm, the academics intended to publish their findings and the algorithm in a paper for use at a forthcoming conference.

In granting the interim injunction restraining publication of certain parts of the academic paper, the court accepted that there were sufficient grounds to justify interfering with the academics’ right to freedom of speech. It was more than merely arguable that the information was confidential, that it had been imparted in circumstances creating an obligation of confidence, and that there had been unauthorised use of that information. Furthermore, the court expressed a concern that if published, the information could be used by sophisticated criminal gangs to facilitate car theft.

There have been a raft of recent cases on the law of confidence which can be used to protect both commercial and personal information. This case highlights how injunctions can be a powerful tool where the disclosing party becomes aware of the recipient’s intentions to publish confidential information before it is published. Courts can grant interim injunctions (such as in this case) which parties can obtain at very short notice to prevent disclosure pending a full trial, and final injunctions to prevent further misuse of the information or to prevent a threatened breach of confidence.

In practical terms, companies seeking to protect their confidential information are advised to ensure that such information is only disclosed in circumstances importing an obligation of confidence (ideally, through a written contract), and taking practical steps to maintain confidentiality, such as ensuring that access to such information is restricted, keeping a contemporaneous written record of developments and ensuring that employee contracts contain clear and appropriate confidentiality provisions.

Without Further Delay: Court of Appeal guidance on assessing repudiatory breach of contract in Telford Homes

Angela Fouracre

It is not uncommon for the delivery of major IT and other technology projects to be subject to, sometimes significant, delays. In the absence of an express contractual right to terminate in the relevant circumstances, disgruntled customers and/or suppliers may find themselves considering their rights of termination under common law.

Determining whether a breach of contract by one party is sufficiently serious so as to be ‘repudiatory’ is notoriously difficult to assess and the repercussions of getting it wrong can be significant. If a party mistakenly treats a breach as repudiatory and terminates the contract, it may put itself in repudiatory breach and be the subject of a claim in damages (see, for example, our article on De Beers UK Limited v. Atos Origin IT Services Limited [2010] EWHC 3276 (TCC) in the January 2011 edition of Legal Eye (Troubled IT projects: a look at the decision in De Beers v. Atos - Articles)).

The Court of Appeal’s recent judgment in Telford Homes (Creekside) Limited v. Ampurius Nu Homes Holdings Limited ([2013] EWCA Civ 577) helpfully sets out factors which should be carefully considered when making an assessment as to whether a breach is repudiatory. While Telford Homes is a construction case, the principal issue of repudiatory breach in the context of a significant delay in meeting contractual obligations will be relevant to suppliers and customers involved with the delivery of IT and other similar projects.

Repudiatory breach of contract

A repudiatory breach is a breach of contract by one party that is sufficiently serious to entitle the other to treat the contract as terminated and claim for damages.

In common law, a right to terminate for breach may arise in several ways, including where there has been a substantial failure to perform. A number of expressions have been used by the Courts to describe the circumstances where a failure of performance would warrant termination, the most common being that the breach must ‘go to the root of the contract’ and/or where the event deprives the innocent party “of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain”[1].

A repudiatory breach does not automatically terminate the contract – it gives the injured party the option of either ‘accepting’ the repudiation and terminating the contract or affirming it so the contract remains in force.

Telford Homes

By way of a brief background to the case, the developer, Telford, was developing four blocks (referred to as A, B, C and D) comprising a mix of commercial units and flats. Ampurius, the investor, was to be granted 999 year leases of the commercial units. The target date for completion of Blocks C and D was 21 July 2010 and A and B, 28 February 2011.

Blocks C and D were completed at the beginning of 2011, nearly 9 months behind schedule. However, work on Blocks A and B was suspended in June 2009 as a result of funding difficulties. Telford resumed work on Blocks A and B on 4 October 2010 but on 22 October Ampurius terminated the agreement on the grounds that the delay to the building of those blocks was a repudiatory breach of contract. Telford purported to terminate the contract themselves on 9 November for non-payment of deposit monies due.

Useful Guidance from the Court of Appeal on Repudiatory Breach

Telford successfully appealed against the High Court’s finding that its breach of contract in relation to the delay was repudiatory.

Assessing whether a breach is repudiatory

While recognising that it was difficult to be sure what exactly was meant by phrases from the relevant authorities such as ‘going to the root of the contract’ and deprivation of ‘substantially the whole benefit’, the Court of Appeal sought to summarise the principles a Court should consider when assessing whether a breach is in fact repudiatory:

Firstly, the benefit the injured party was intended to obtain from performance of the contract (in this case, the benefit to the investor was
a leasehold interest of 999 years in the commercial units of the four blocks).

Next, the effect of the breach on the injured party including:

- What financial loss has it caused;
- How much of the intended benefit under the contract has the injured party already received;
- Whether the injured party can be adequately compensated by an award of damages;
- Whether the breach is likely to be repeated;
- Whether the 'guilty' party will resume compliance with his obligations; and
- Whether the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations.

**Date of Assessment**

The Court of Appeal also set out three important principles arising from its analysis of one of the key authorities in this area, *Hong Kong Fir*:

- A Court must look at the position (that is the seriousness and character of the breach) as at the date of the purported termination of the contract (as opposed to, say, the date of the alleged breach itself);
- When looking at the position as at that date, a Court must take into account any steps taken by the 'guilty' party to remedy accrued breaches of contract (e.g. if a breach has been remedied or delay has been made up by faster performance at the time a party purports to exercise a right of termination, these will be important factors to take into account in determining whether a breach was repudiatory); and
- A Court must take account of likely future events, judged by reference to objective facts as at the date of the purported termination.

**Decision and Comment**

The Court found that the delay to the development had not caused any actual loss to Ampurius as market values had not declined over the relevant period and any future losses, such as additional funding costs, would have only been in the order of £100,000, which in the context of an overall development of £100 million, was not of a scale of magnitude sufficient to warrant characterising it as repudiatory. Further, the delay of just over a year in the context of a 999 year lease did not deprive Ampurius of a substantial part of the benefit. Telford had made clear throughout that it had every intention of performing the contract and completing the development.

It was further found that the High Court had been wrong to assess the repudiation in this case by reference to a date in 2009 (that is when it was still unclear when the works on Blocks A and B would restart) and that the correct date was the date of the purported termination. There was no repudiatory breach then available for acceptance as work on Blocks A and B had already restarted on the date Ampurius purported to terminate the contract, removing any element of uncertainty for Ampurius.

The Court of Appeal has helpfully set out principles which provide useful guidance to those considering terminating a contract at common law where there has been a failure by one party to perform its obligations. However, establishing that a party is in repudiatory breach remains difficult and any such proposed action should be very carefully considered. Where certainty is required, parties are best advised to include express provisions in their contract making clear when it can be terminated and the consequences (financial and otherwise) of doing so.

---

1. *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26*

2. Telford Homes has already been followed in this regard in another construction case handed down this month (July 2013) where the Court of Appeal found that a developer's delay of approximately one month did not deprive a buyer of substantially the whole benefit of a lease of a flat being built and so the buyer was not entitled to terminate (*Urban I (Blonk Street) Limited v. Ayres and another [2013] EWCA Civ 816)*.
In Good Faith: Recent Developments

Angela Fouracre

In the June 2012 edition of Legal Eye – Technology Disputes, we looked at contractual obligations of good faith and, in particular, a case which was decided before the High Court – Medirest v. Mid Essex Hospital.

The Court of Appeal recently overturned the High Court’s decision in Medirest and two more cases dealing with good faith have since been decided. We consider below how this area of law is developing and some of the key points and reasoning arising from those judgments.

Good Faith

There is no general obligation of ‘good faith’ in English contract law although a duty of ‘good faith’ is implied by law in certain limited categories of contract, such as insurance and employment contracts.

The Courts have sought to avoid recognising a common law duty of good faith as it is thought that a general requirement of good faith would create too much uncertainty. Parties should be free to pursue their self-interest both in negotiations and in performance of a contract, provided no term is breached.

Accordingly, if parties to a contract wish to impose such a duty, they must do so expressly.

Quick summary of key points arising from recent case law

• Parties can expressly agree contractual duties to, for example, co-operate in good faith.

• The Courts remain resistant to recognising a duty of good faith implied by law into all commercial contracts. However, a requirement of good faith can be implied into a commercial contract using the established methodology for implying terms.

• Whether considering an express or implied duty of good faith, the content of the duty to perform a contract in good faith is heavily dependent on context and is established through a process of construction of the contract.

• General and potentially open-ended good faith obligations are, on the whole, being construed narrowly by the Courts and may not be considered applicable to contractual terms where a party already has an absolute right to, for example, make payment deductions for poor performance or terminate the contract.

A matter of construction: Medirest v. Mid Essex Hospital

Medirest provided the Trust with catering and cleaning services. The contract included a clause which imposed an express duty of good faith:

“The Trust and [Medirest] will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract”.

The Trust monitored Medirest’s performance every month, which it assessed harshly - principally through the excessive award of service failure points and payment deductions. Consequently, relations between the parties rapidly deteriorated culminating in both seeking to terminate the contract and claim for breach of contract by the other.

The two main issues on appeal were (a) the effect of an express obligation to “co-operate... in good faith” and (b) whether there was an implied term that the Trust would not act in an arbitrary, irrational or capricious manner in assessing Medirest’s performance.

The Court of Appeal (overturning the High Court’s decision) concluded that, as a matter of construction, the contractual good faith obligation was not a general one which qualified or reinforced all of the obligations on the parties - it was limited to the two purposes stated in the second half of the clause. As the authorities are clear that a duty of good faith is heavily conditioned by its context, the Court took the view that the obligation meant that the parties would work together honestly, endeavouring to achieve the two stated purposes. Accordingly the Trust was not in breach of the good faith clause in making excessive deductions as it had not done so dishonestly and in any event they were irrelevant to the two stated purposes.

Further, it was held that the only element of discretion the Trust had was regarding whether or not to exercise its absolute contractual right to
award itself payment deductions and service failure points. This was not subject to an implied term that such discretion would not be exercised arbitrarily, capriciously or irrationally. In any event, there was no need to imply such a term as the contract already contained checks and measures preventing the Trust from awarding itself more than it was entitled to.

The Court did however find that the Trust was in breach of certain payment provisions but those breaches were effectively cured before Medirest terminated as the Trust repaid the sums it had wrongfully deducted. The only outstanding breach at the time of termination was the Trust’s excessive calculation of service failure points, which the Court held was not material and that Medirest had not therefore been entitled to terminate.

**Implying an obligation of Good Faith**

- **Yam Seng v ITC**

Another good faith case, Yam Seng, was referred to in the Medirest judgment. The judge’s considerations in Yam Seng as regards implying a duty of good faith into a contract were also considered to be relevant to the interpretation of express obligations of good faith.

International Trade Corporation ("ITC") granted Yam Seng the exclusive rights to distribute Manchester United branded fragrances in certain territories, including certain duty free outlets. The business relationship deteriorated over a period of time, culminating in Yam Seng terminating the agreement for repudatory breach.

Yam Seng claimed damages for numerous alleged breaches of the distribution agreement including breach by ITC of an implied term that the parties would deal with each other in good faith by not undercutting prices agreed by offering the same products for sale at a lower price in the domestic market of the same territory and not providing false information in respect of which ITC knew Yam Seng was likely to rely in marketing the products.

The High Court acknowledged that the general view is that in English contract law there is no general legal principle of good faith. Leggatt J did not think that English law had reached the stage where it is ready to recognise a requirement of good faith as a duty implied by law into all commercial contracts.

However, he saw no difficulty in implying such a duty in an ordinary commercial contract if the established English law methodology for implying terms in contracts was followed - the principal criteria being either the term is so obvious that it goes without saying or that the term is necessary to give business efficacy to the contract. Alternatively, what would the contract, read as a whole against the relevant background, reasonably be understood to mean? The relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour – an example of a general norm which underlies almost all contractual relationships is an expectation of honesty. The Court pointed to bodies of case law where terms have been implied which could be categorised as aspects of good faith, such as duties of co-operation in the performance of a contract and the exercise of contractual discretion honestly and in good faith and not arbitrarily, capriciously or unreasonably.

Against this background, the Court implied two particular terms in this case – an implied duty of honesty in the provision of information and an implied duty not to approve a domestic retail price for a product which undercut the duty free retail price. The Court was influenced by the fact that the distribution agreement had been drafted by the parties and was skeletal and it was common ground that it was an industry assumption that retail prices in domestic markets will be higher than the corresponding duty free retail prices. Accordingly, Yam Seng was found to have lawfully terminated contract.

- **TSG v. South Anglia Housing**

While the Court was willing to imply obligations of good faith in Yam Seng, the Technology and Construction Court’s recent decision in TSG v. South Anglia Housing serves as a reminder that this will not always be the case.

TSG and South Anglia entered into a contract for the provision of gas servicing which included (a) a term which provided that the parties would work together in the spirit of trust, fairness and mutual co-operation...within the scope of their agreed roles, expertise and responsibilities...and in all matters...they shall act reasonably and without delay (b) a further term permitting either party to terminate the contract on three months’ notice.

South Anglia terminated the contract on 3 month’s notice, for reasons which were never made apparent. TSG sought to argue that termination
pursuant to clause (b) had to be effected in good faith or (as provided for in clause (a) above) at least reasonably.

Referring heavily to the Court of Appeal’s judgment in *Medirest*, Mr Justice Akenhead found that clause (a), as a matter of construction, did not provide for any constraint, condition or qualification on the apparently unfettered right of either party to terminate in effect for convenience. If clause (a) required South Anglia to act reasonably in respect of each and every one of its powers, it would undermine a number of other clauses which the parties mutually agreed.

The Court further found (with reference to the *Yam Seng* judgment above) that there was no implied term of good faith – clause (a) expressed how far the parties wanted to go in working together, that is in a spirit of ‘trust fairness and mutual cooperation’ and to act reasonably. Even if there had been an implied term of good faith, it would not circumscribe or restrict what the parties had expressly agreed in clause (b), that is either party for no, good or bad reason could terminate at any time. That is the risk that both voluntarily undertook when they entered into the contract.

---

**[1]** Compass Group UK (trading as Medirest) v. Mid Essex Hospital Services NHS Trust [2012] EWHC 781 (QB)

**[2]** Yam Seng Pte Ltd v. International Trade Corporation Ltd [2013] EWHC 111(QB)

**[3]** TSG Building Service plc v. South Anglia Housing Limited [2013] EWHC 1351

---

**FAPL v BSkyB: Latest s.97A order blocks sports streaming website**

*Flora Greenwood* and *Tom Ohta*

The English High Court has granted an injunction requiring the six largest ISPs in the UK to block end-user access to the FirstRow Sports website which provided unauthorised streams to live sports events including Premier League football matches. This is the first time that a ‘site-blocking’ order has been granted in respect of streamed content rather than file-sharing websites.

As previously reported (see [HERE](#)), section 97A of the CDPA 1988 allows the Court to make orders requiring ISPs who have actual knowledge of third parties using their service to infringe copyright to block or impede end-user access to specified websites. This has now become well-established as a means for rights-holders to protect their intellectual property rights where taking effective, direct access against the website operators has proved impossible.

In this latest case,[1] the Court was faced with a different subject-matter to previous s.97A applications with a website that linked to streamed content, rather than one facilitating peer-to-peer file sharing. FirstRow Sports was an indexing and aggregation portal that presented end-users with a list of links, organised by sport and time of day, to streams containing live coverage of a wide range of sporting events. The streams themselves were not provided by FirstRow Sports, but from other third parties, none of whom were authorised to transmit them. It was a highly lucrative business for FirstRow, with experts estimating an annual advertising revenue of between £5.3m - £9.5m.

The Court accepted FAPL’s position that the website operators (and also various publicans using FirstRow to show sports events in their pubs) infringed the rights-holder’s exclusive right to “communicate the work to the public” under s.20 CDPA. Two points are worth noting in this regard:

- It must be shown that there has been a “communication” of the work by way of electronic transmission. Applying the CJEU’s guidance in *ITV v TVCatchup*[2], the Court considered that this limb was satisfied bearing in mind the way that FirstRow made works available to its end-users by aggregating third-party streams, indexing them, and providing ease of access to content via a hyperlink. A material factor in the Court’s finding that FirstRow was responsible for the “communication” (given that the streams emanated from third parties) was that FirstRow provided the frames
in which the stream was shown.

- It was not possible for FAPL to identify the website operators behind FirstRow which had been registered under multiple domain names, and the site itself was hosted outside the jurisdiction in Sweden. Thus, where the “communication” originated from outside the jurisdiction (i.e. from the host server in Sweden), in order to establish the English court’s jurisdiction,[3] it was necessary to show that the communication was intended to target the public in the UK.[4] This was established in this case, with persuasive factors including the fact that FirstRow displayed adverts for UK companies, provided access to sports events which were very popular in the UK, and that 12-13.7% of its worldwide traffic came from the UK.

Having established that the Court had jurisdiction to hear the claim, the Court had to satisfy itself that the site-blocking order sought under s.97A was proportionate bearing in mind the fundamental rights of all parties involved, such as FirstRow’s right to freedom of expression and the rights-holders’ interests in protecting their intellectual property rights.

The Court considered that the terms of the order sought (which had been agreed between the various ISPs and the rights-holders) were proportionate. One persuasive factor was that the Court considered that the public interest was being undermined by FirstRow enabling its users to breach the “Closed Period” on Saturday afternoon, bearing in mind the underlying sporting objective to encourage attendance at live football matches.

Until now, s.97A site-blocking orders have been dominated by claimants in the music and film sectors concerned with peer-to-peer file sharing sites, rather than broadcasters of sports events seeking to combat unauthorised streaming of their broadcasts. This case, which relied upon recent CJEU developments, suggests that an expanding group of rights-holders are looking to s.97A as a means of enforcement. It is likely to come as a welcome development for parties whose rights are typically infringed by unauthorised streaming, but will be less welcome to ISPs who are increasingly being relied upon to prevent piracy.


[4] following the CJEU’s decision in Case-173/11 Football Dataco Ltd v Sportradar Gmbh as applied by Arnold J in EMI Records Ltd and others v British Sky Broadcasting Ltd and others [2013] EWHC 379 (Ch)