DLA PIPER

MANUFACTURING MATTERS

Winter 2015

INTRODUCTION

Welcome to Manufacturing Matters, DLA Piper's specialist publication providing a round-up of legal news, sector updates and commentary for clients and contacts engaged in the manufacturing sector.

Richard May
Partner
Head of Manufacturing
T +44 333 207 7751
richard.may@dlapiper.com

The end of 2014 saw solid domestic and export growth by the industry, shrugging off recent signs of a slowdown. According to the Quarterly Economic Survey for Q4 2014, published by the British Chambers of Commerce, the manufacturing sector recorded increases in the balances for domestic sales, export sales, recruitment intentions and turnover confidence. A happy ending and a sigh of relief all round.

So what can we expect from 2015? Globally there is no doubt that economic activity is weakening. Driven mainly by a decline in orders from China and the US, and uncertainty again in the Euro where PMI has remained stagnant since August 2014.

However there are reasons to be cheerful – Britain is experiencing a welcome resurgence in support for British manufacturing with our manufacturing companies now at the forefront of developing the solutions to tomorrow's industrial and economic challenges. More needs to be done, if we want to be a great manufacturing and trading nation again, and if we are to generate the better balanced growth our economy desperately requires.

With a general election just around the corner and sector opportunities and challenges surrounding mobile, 3D printing, factory of the future, customisation, servitisation, integrating the supply chain, collaborating to innovate and resource scarcity, to name just a few – 2015 promises to be another interesting year.

Just a final word, at DLA Piper we pride ourselves on the quality of expertise and service we deliver to our clients and contacts and are very excited to announce that we are partnering with EEF on the flagship Manufacturing Outlook quarterly report. We look forward to sharing with you the highly regarded up-to-the-minute sector analysis, trends and forecasting with expert insight from the EEF's chief economist.

I hope you enjoy this edition.

IN THIS ISSUE

Manufacturing Matters is compiled with current issues and trends in mind. If you would like to get in touch, please contact us by emailing manufacturing@dlapiper.com.

PRE-ACTION COSTS PROTECTION IN ENVIRONMENTAL CLAIMS

In a landmark judgment the Court of Appeal has held there is no automatic right to costs protection for litigants in private law environmental litigation and has laid down new criteria which litigants must satisfy to claim costs protection.

THE SIGNIFICANCE OF PRIVATE CASES NUISANCE

Private nuisance allows environmental campaigners to continue a disruptive crusade against developments after the planning process has concluded. However, the costs of private nuisance claims are often disproportionate to the damages recovered. On average, a claimant might recover £5-10,000 in damages for a claim costing several hundreds of thousands of pounds in legal costs.

The holy grail for campaigners is maximising the adverse cost risk for the operator, whilst ensuring their costs exposure is capped or eliminated. In this context, the status of the Aarhus Convention, ratified by the UK in 2005, has come to the fore. One of the key functions of the Convention is to ensure processes for challenges are equitable, timely and not prohibitively expensive (Article 9.4).

The UK Government has introduced fixed reciprocal cost caps in what are termed "Aarhus Convention Claims" (CPR 45.41), limited to judicial reviews. However, the question of whether private nuisance claims are automatically encompassed by the Convention has remained unresolved.

For the courts there is a fine line to tread between:

- ensuring individuals of limited means have recourse to the courts where the quiet enjoyment of their home is genuinely disturbed; and
- allowing private nuisance to become a vehicle for costly and potentially unmeritorious litigation brought by campaigners to disrupt operations at a site that is operating within the terms of its permits.

LANDMARK COURT OF APPEAL JUDGMENT

Now, the Court of Appeal in **Austin v Miller Argent (South Wales) Limited [2014] EWCA Civ 1012** has sought to determine these issues. Mrs Austin, an environmental activist, applied for a Protective Costs Order ("PCO") to hold her harmless from any cost liability to Miller Argent if she lost her claim in private nuisance. She also claimed Miller Argent should remain fully exposed to her costs if she won. Miller Argent is undertaking a land reclamation operation, self-funded by the extraction of coal, north of Merthyr Tydfil.

The Court decided certain private nuisance claims may come within the Convention's scope and laid down the following criteria:

- there must be significant public interest to justify conferring special costs protection;
- the complaint must have a close link with the particular environmental matters regulated by the Convention; and
- the claim must, if successful, confer significant public environmental benefits.

Crucially, the Court accepted Miller Argent's submissions that the existence of an alternative, potentially cheaper procedure such as the statutory remedy of public nuisance, was a factor to consider when exercising its discretion on whether to grant a PCO under Article 9.4.

The Court decided the Article 9.4 obligation is "*no more than a factor to take into account when deciding whether to grant a PCO*". Having regard to this, the Court was not satisfied that it would be just to impose a PCO in Mrs Austin's case. In exercising its discretion, the Court took account of the following factors:

- the strong element of private interest; and
- there was no satisfactory evidence demonstrating the potentially cheaper statutory nuisance route had been adequately explored.

CONCLUSION

Although litigants will, in appropriate cases, be able to bring private nuisance claims with costs protection, this should be a last resort. The onus is on applicants to assess whether they will satisfy the criteria required to qualify for a PCO by showing their case is genuinely in the public interest, that they have properly engaged with public authorities and adequately explored other potential remedies.

PAUL STONE
Partner (Litigation & Regulatory)
T +44 333 207 7255
paul.stone@dlapiper.com

JOANNA HAIGH
Solicitor (Litigation & Regulatory)
T +44 333 207 7186
joanna.haigh@dlapiper.com

Paul and Joanna acted for Miller Argent (South Wales) Limited in *Austin v Miller Argent (South Wales) Limited* [2014] EWCA Civ 1012 and also *Austin v Miller Argent (South Wales) Limited* [2011] EWCA Civ 928.

SHARED PARENTAL RIGHTS
WHAT YOU NEED TO KNOW

Introduced on 1 December 2014, the Shared Parental Leave (**"SPL"**) regime applies to children expected to be born (or placed for adoption) on or after 5 April 2015.

A mother is still obliged to take two weeks' compulsory maternity leave following the birth of her child. However, if both the mother and her partner are eligible, they may share up to 50 additional weeks of SPL. Both carers may take leave at the same time or consecutively, so long as the total leave taken does not exceed the overall entitlement.

The eligibility criteria are complex, broadly they require the employee to:

- have at least 26 weeks' continuous employment;
- still be working for the employer when the leave commences;
- have the main responsibility for caring for the child; and
- meet specific earnings tests.

The mother must also have ended her right to maternity leave early to access SPL, this is done by serving a "curtailment notice" on her employer.

Anyone intending to take SPL must give written notice of their entitlement, and intention to take SPL, and provide appropriate evidence if requested. They must then give a further "period of leave" notice indicating when they will be taking the leave. An employee can give up to three "period of leave" notices to their employer.

SPL must be taken in multiples of complete weeks, with the minimum period of leave being one week. During SPL, the employee is entitled to the benefit of all their terms and conditions of employment, except in relation to remuneration. After a period of SPL they also have an entitlement to return to work.

Up to 37 weeks' statutory maternity pay will be transferrable between the partners, if eligibility requirements are met. SPL pay is currently paid at £138.18 a week or 90% of average weekly earnings, whichever is lower.

Requests for continuous periods of leave cannot be rejected by an employer. However, requests for discontinuous periods of leave may be rejected. Businesses should be aware of the fact that employees could work around the rules on discontinuous leave by using their three prescribed notices to take three separate blocks of continuous leave, this would mean the business would have no ability to refuse the leave. The fact that a request for continuous leave cannot be refused, regardless of the needs of the business at the time, raises significant issues for businesses regarding how to manage cover for these periods. Early discussions with employees may shed light on their intentions.

The technicality of the notice requirements means this is a complex regime for employees and employers to navigate. A clear system for submitting and managing notices will assist in ensuring employees who wish to take SPL know what is required of them.

Government guidance states that there is no requirement for employers to extend any enhanced benefits under maternity schemes to the new SPL system. However, there is potential for a discrimination claim if a man is only paid statutory pay, where a woman would be paid enhanced maternity pay. If any SPL benefits are introduced, they must be equally available to men and women to prevent any allegations of unequal treatment.

In summary the practicalities of the new regime are complex and are unlikely to encourage many fathers to take additional leave. These complexities also mean that businesses are unlikely to encourage parents to take advantage of the new regime, and the administrative burden that it places on HR departments is likely to be significant.

IMOGEN NOONS
Legal Director (Employment)
T +44 333 207 7035
imogen.noons@dlapiper.com

DUE DILIGENCE ON YOUR PARTNER IN CHINA

ARE YOU TALKING TO THE RIGHT PERSON?

Due diligence ("DD") is the most important part of the work you do when preparing to work with a Chinese company. It is more important than having well-drafted contracts in place, and it is more important than creating a good relationship with your Chinese counterparty. We're not saying those are unimportant, just that DD is more important.

DD is the technical term for getting to know the details of a company or person that you intend to do business with. It is more commonly used when one company is planning to buy another company – it carries out DD on the target to make sure that company is in good standing. DD is also carried out by companies on potential business partners, to make sure they really can do what they claim to be able to do, and will be an asset to the business, not a liability. This article focusses on the second type of DD, and looks at how to do this in China. Many manufacturing companies are eager to find good business partners in China, whether for distribution of their products there, for manufacturing for export, or for processing trade.

QUESTIONS YOU SHOULD BE ASKING:

- Is the business a genuine business? Obtain copy of their business licence and, if possible, check with local Commerce and Industry Administration Bureau on the legitimacy of the Chinese business.
- Is the business a real manufacturer or distributor? You will often find you are actually dealing with a middleman. You need to see a copy of their business licence and make sure the company name is the right one. Don't ever go by the made-up English name of the Chinese company. Only the Chinese-character name of a company has legal effect – the translated names are meaningless and should not be used on contracts except as defined terms.
- Does the Chinese manufacturer have an international quality accreditation? Obtain a copy and check with the relevant organisation.
- What reputation does the Chinese company have? In particular, will it protect your intellectual property?

The last point is particularly important and is really a subject in itself. If you intend to engage with China in any way, either by selling your products there or sourcing them, you should have an intellectual property protection strategy in place, not just a few clauses in a contract.

DD is carried out in various disciplines – financial DD (done by accounting firms), legal DD (done by law firms like DLA Piper), tax (which can be done by either), personal (done by investigation firms), anti-criminal risk (done by a combination of all the above), environmental (done by environmental agencies together with law firms), and various others. Not all of these are necessary, but usually legal DD is considered to be a bare minimum, and the law firm conducting the work might recommend other forms of DD during the process. However it is worth noting that although the concept of DD has been hijacked to some extent by the service providers named above, a manufacturer with a limited budget can do a certain amount of the work itself. The idea is, after all, simply to find out as much as you can about the proposed partner so that you can make an informed decision about whether to work with them, and if you do, how to reduce the risk.

Many companies are dimly aware that it is important, but these days budget pressures means they need to prioritise how they spend their service provider money, and that doesn't always include detailed DD. It is very common for clients to ask hopefully for diligence to cover "just the big ticket issues" or "solutions, not problems". While this attitude is understandable, it is also unwise. There is no way for your service provider to know what the big ticket items are until they have done thorough investigations, which in China takes time and money. When they have dug deep into the company, only then they are in a position to identify the most important problems. It is also not possible for there to be a legal "solution" to every legal problem that appears. You should be asking the service provider not to solve every problem (which usually means explaining it away), but instead to be explaining the significance of the risk, so you can decide whether to accept that risk or not.

In my personal experience (which includes 15 years of legal work in China) if you want to cut legal costs, cut them in other areas. There's no need to pay your lawyers to negotiate every clause of the contracts you'll be using, as in any case those are likely to be unenforceable if a dispute arises. Similarly, don't place so much faith in your relationship building. Some companies spend more on flying back and forth to China and attending pointless conferences as they do on the nuts and bolts work. If you have a tight budget, spend it wisely.

NICOLAS GROFFMAN
Partner (Corporate)
T +86 21 3852 2121
nicolas.groffman@dlapiper.com

AN INTERVIEW WITH BARCLAYS

MICHAEL RIGBY, HEAD OF INDUSTRY, MANUFACTURING, TRANSPORT & LOGISTICS

Michael Rigby is the National Head of Manufacturing, Transport and Logistics for Barclays. He is responsible for the strategy, portfolio and income performance for the sector in the UK and Ireland. Mike's vision is to make Barclays the 'go to' bank for businesses in the medium to large space.

Mike has a wealth of experience in the banking sector. Prior to joining Barclays in 2008, he spent 14 years at HSBC in a number of roles in the Credit, Retail and Corporate divisions.

Mike enjoys all sport; particularly golf, skiing, rugby and running. He coaches the 'mini's' section of his local rugby club. He is passionate in his support of his chosen charity – Baby Lifeline – and has undertaken numerous events to raise funds, including three marathons and two triathlons.

Mike lives in Tunbridge Wells with his wife Kate and their two young children, Oliver and Eva May.

Mike, looking ahead to the next three years, what are the biggest challenges you see manufacturers facing?

Over the next couple of years, the biggest factors I see manufactures facing include:

- investing enough in R&D to keep pace with the incredible speed of innovation; and
- hiring quality staff: the shortage of skilled and unskilled labourers is a restricting factor for the manufacturing sector in general, and high on the agenda of all manufacturers.

Following on from those factors, how do you think the Government can better support UK manufacturers?

The main point here is having a long term (all parties) strategy for the sector, particularly for the following:

- encouraging exports (UKTI etc.);
- encouraging investment (Tax Credits);
- delivering an educated, capable workforce (education and apprenticeships); and
- predictable taxation policy.

Now on to the positive Mike – where do you see the opportunities in the manufacturing sector in the UK in the next 12 – 18 months?

I think the opportunities will come from taking advantage of the faster growing economies from an exporting perspective and investing in the next generation of products/solutions to take advantage of the recovery – when it comes.

With these opportunities, which sectors within manufacturing do you see as positive for growth?

I think the following will definitely see positive growth going forward:

- Automotive.
- Aerospace.
- Food & Drink.
- Electrical/Electronic.

Finally Mike, if you were to sum up British manufacturing in just five words, which words would you choose?

Innovative products with excellent service.

THE VALUE OF 'MADE IN BRITAIN'

Barclays have recently published their latest manufacturing report, entitled The value of 'Made in Britain'. The report explores the value of 'Brand Britain' to UK businesses and shows that exporters would benefit from labelling their products as 'Made in Britain'.

In an increasingly competitive global market place, Barclays' research shows that British exporters could unlock a premium of up to £2.1 billion by branding their products as 'Made in Britain', across the eight countries in this study. This is particularly true in new and emerging markets, where there is a growing appetite for British-branded goods. To access the report visit www.barclayscorporate.com (Insight & Research page), where Barclays regularly publish industry-relevant research and reports.

MICHAEL RIGBY
Head of Industry, Manufacturing
Transport & Logistics
Barclays
T +44 20 7116 8731
michael.rigby@dlapiper.com

ALTERNATIVE FUNDING OPTIONS

FOR LARGE PIECES OF PLANT AND MACHINERY

It is well known that following the credit crunch of 2007/2008 many in the banking market have tightened their lending criteria, making it more difficult, and in some cases impossible, for SME's to access funding by the more traditional route of loans and overdrafts.

One result of the reduction in mainstream lending has been the dramatic development of the "Alternative Finance" market. This market has provided much needed sources of finance to businesses to enable them to develop, where otherwise they may have been faced with stagnation or, in some cases, failure.

THE EXPLOSION OF THE MARKET

According to The UK Alternative Finance Report 2014 (produced in November 2014 by the charity Nesta in conjunction with the University of Cambridge) ("**Report**") the Alternative Finance market has more than doubled in size year on year since 2012. The market was expected to grow to £1.74 billion by the end of 2014.

AWARENESS

Despite the rapid development of the market, awareness is currently relatively low with only 44% of SME's surveyed for the Report being aware of alternative finance options, and only 9% of those surveyed having used or sought to use alternative finance options. Given the projected rise in the market, these percentages appear likely to increase over the next few years.

WHAT IS "ALTERNATIVE FINANCE"?

The Report describes alternative finance as the "umbrella term that covers a range of different [financing] models"… which sit outside the traditional mainstream finance system.

A few examples of the types of funding which would come under this heading and which may be of particular interest to companies within the manufacturing sector include:

- **Asset Finance** – A relatively long established method of raising finance for businesses, this market continues to grow. The National Association & Commercial Finance Brokers 2013 survey highlighted that leasing had more than doubled over the preceding two years. Asset finance can be used as a method of securing financing for the purchase or re-financing of specific asset(s), or as a way to generate greater working capital for the group. There are two main asset finance structures: secured lending and leasing/hire-purchase. As an alternative to the traditional loan and security structure, many companies choose to enter into leasing or hire-purchase arrangements. Leasing structures can have tax advantages for businesses, for example an operating lease can enable a business to have full use of an asset without the asset being accounted for on the company's balance sheet.
- **Invoice Finance** – Invoice discounting uses debtors as security to provide working capital finance. Like asset finance, it is a more established form of alternative finance with many specialist invoice finance companies operating in the market.
- **Peer 2 Peer Business Lending** – Peer 2 Peer Business lending involves a number of individuals collectively providing secured or non-secured loans to a business. This market has more than tripled in size since 2013. According to the Report, 23% of total Peer 2 Peer Business lending in 2013 was to the manufacturing sector.
- **Pension-led Funding** – mainly used by small businesses, SME owners/directors use their accumulated pension funds in order to invest in their own businesses. According to the Report, Pension-led Funding provided more than £25 million of finance to SME's in 2014.

CONCLUSION

The Alternative Finance market looks set to increase its market share over the next few years as alternative funding institutions increase their offering and develop different funding structures, and businesses become more familiar with the alternative options available to them. In time, the "Alternative" may become mainstream.

BETHAN MOORE
Senior Associate (Restructuring)
T +44 333 207 7676
bethan.moore@dlapiper.com

CLAIRE DEASEY
Associate (Finance and Projects)
T +44 333 207 7649
claire.deasey@dlapiper.com

PRODUCT RECALL
RECOVERING THE COSTS

Product liability claims and product recalls can be a major risk for manufacturing companies, distributors or retailers worldwide, in many different ways. Many companies are now alive to this challenge and have good systems and procedures in place to deal with such incidents if and when they occur.

Even in companies which have the best systems and procedures for managing an event and, importantly, experience of doing so, a product recall can be a major project. Management and employees are likely to be diverted from their usual duties to investigate the issue, to put measures in place to ensure that products are recalled and all regulatory requirements are met, and generally to "rectify the wrong".

Once the dust has settled and the risk has been mitigated or extinguished, a company may be left wondering what steps it can take to recoup the costs of the recall, or at least part of them. In many cases where there has been a breach of contract or negligence, somewhere in the supply chain which has caused the recall, it is possible to look to recover the costs, including for wasted management and staff time.

One thread of legal authority says that in situations where the recall arises as a result of a breach of contract or negligence, it can, in certain circumstances, be possible to recover the cost of wasted staff time spent on the investigation and/or mitigation of the potential loss, notwithstanding the fact that no additional direct expenditure loss or loss of profit or revenue can be demonstrated.

However, such wasted staff time claims are subject to the proviso that it must be demonstrated with sufficient certainty that the wasted time was actually spent on investigating and mitigating the relevant breach of contract and/or negligence and that the expenditure of time was directly attributable to such a breach.

In pursuing such a claim for wasted staff time a company will need to demonstrate with compelling evidence:

- some significant disruption to the business;
- that staff have been significantly diverted from their usual activities; and
- that if the staff had not been so diverted they would have directly or indirectly generated revenue.

TOP TIPS

In order to have the best prospects of succeeding in such a claim, do not wait until the recall project is concluded before considering this limb of your potential recovery. It needs thinking about at the outset and it needs to be planned for. It ought to be part of the initial project planning of every recall event.

Incorporate into the company's recall policies and systems a method to contemporaneously record:

- the activities of staff and management during the recall project;
- a log of the length of time that staff and management spend on those activities;
- the work and nature of the work that any employees are unable to perform due to their diversion to other duties; and
- all time spent and costs incurred by the company if it has been required to recruit additional/temporary employees to deal with the recall e.g. call centre support.

Be mindful of the fact that any documents created at this time are likely to be disclosable to the other party if litigation is subsequently commenced, so take care to keep all records neutral.

R&V Versicherung AG V Risk Insurance and Reinsurance Solutions SA and others [2006] EWHC 42 (Comm)

Aerospace Publishing Limited and another v Thames Water Utilities Ltd [2007] EWCA Civ 3

Bridge UK.Com Ltd v Abbey Pynford plc [2007] EWHC 728 (TCC)

CHARLES ARRAND
Partner (Litigation & Regulatory)
T +44 333 207 7001
charles.arrand@dlapiper.com

HOLIDAY PAY
A NEW YEAR'S GIFT FOR EMPLOYEES, A HEADACHE FOR EMPLOYERS

On 4 November, the Employment Appeal Tribunal ("EAT") handed down its judgment in the holiday pay appeals in *Bear Scotland v Fulton and Baxter*. The decision of the EAT is many elements of pay which are currently excluded from the holiday pay of many workers must be included, in particular, compulsory non-guaranteed overtime (overtime which the employee must do if asked).

Most employees will therefore now be entitled to have their holiday pay calculated as an average of all elements of pay which they have received during the 12 weeks prior to the holiday being taken.

Prior to the EAT decision, there was a concern that claims for underpaid holiday pay going back as far as 1998 could succeed. This would have meant huge back pay costs for businesses where holiday pay was calculated with reference to basic pay only, and had not included payments such as commission and overtime.

However, the EAT appeared to recognise the damage this could cause to businesses and decided to limit the extent of back pay claims. The decision has resulted in the majority of clams being limited to the current holiday year only. This will be the case where there is at least a three month gap between payment to the employee for the 20th holiday taken in one holiday year, and payment for the first holiday taken in the next holiday year. Therefore, for a January to December holiday year, if an employee takes 20 days' holiday and is paid for these before 30 September, there will be a three month gap before the first holiday can be taken in the next holiday year, and the employee would only be able to claim underpayment for the current holiday year.

Following the EAT decision, the Government introduced new legislation on 8 January 2015 to limit holiday pay claims to a maximum of two years' back pay. Therefore, for employees who do not have a three month gap in their pattern of holiday (as above), claims will still be limited. However, the limitation only applies to claims presented on or after 1 July 2015, and not those presented before that date.

OVERTIME

The EAT decision related only to compulsory overtime. There is currently no binding decision regarding the inclusion of voluntary overtime. It is my view, however, that based on the current trend of case law, this will soon be challenged and at least regular voluntary overtime (as opposed to ad-hoc overtime) will be included.

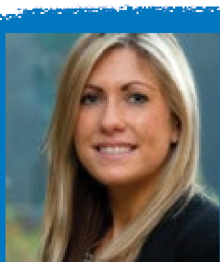
For the time being, some employers are choosing to distinguish between compulsory and voluntary overtime and only include compulsory overtime within the holiday pay calculation. There is a risk in attempting to dress up compulsory overtime as voluntary, particularly in the manufacturing sector where there is often a genuine operational need for overtime and employees are required to accept it, regardless of what may be stated in their terms of employment. This is particularly the case where, for example, an employee's shift ends part way through a task and they are required to remain in work until that task is completed. Employers who do decide to distinguish between compulsory and voluntary overtime are advised to put aside funds in reserve relating to regular voluntary overtime, to cover potential future claims.

The *Bear Scotland* decision concerned mainly overtime payments. However, other recent cases have dealt with other payments which fall outside basic pay. A summary of the current position is set out below.

Pay element	Payable for holiday pay
Contractual allowances	**Yes** (e.g. shift payments, travel allowances)
Allowances purely aimed at covering expenses	**No**
Commission	**Yes**
Bonus	**Not yet decided**
Contractual overtime (compulsory and guaranteed)	**Yes**
Compulsory overtime (not guaranteed but the employee is required to do it if asked)	**Yes**
Regular voluntary overtime	**Not yet decided**
Ad-hoc occasional voluntary overtime	**Not yet decided**

SUMMARY

Employers should consider their potential liability in relation to exposure going forward and determine how best to minimise wage bills. Employers will also need to consider the extent and value of possible back pay claims. Despite potentially limiting the extent of back pay claims, what is certain is that the decision of the EAT will lead to higher wage bills for many employers in the future, particularly in the manufacturing sector where workers regularly work large amounts of overtime. The unions representing the employees have confirmed there will be no appeal. The position is therefore unlikely to get any better for employers. There is no one size fits all approach to tackling this issue, as much will depend upon the way the organisation works. All employers will now need to carefully consider the best way to deal with back pay and limit future liability.



JENNA CLARKE
Senior Associate (Employment)
T +44 333 207 7903
jenna.clarke@dlapiper.com

CONTRACT MECHANICS
THINK BEFORE YOU SIGN

A recent case in the High Court has illustrated the importance of ensuring a contract is clear and contains expressly what parties have agreed and intended before the contract is signed and completed.

In the case of *Bir Holdings Limited v Mehta [2014]* a dispute arose between the parties resulting from the sale of shares in the company. Under the terms of a share purchase agreement (**"Contract"**) dated 23 December 2010 the buyer paid £687,500 for the shares in the company, although the Contract provided that on completion £250,000 of the purchase price would be paid into a retention account held by the buyer's solicitors. This was to take account of any "relevant claims" under the Contract.

If the buyer's solicitors were notified of a "relevant claim" (broadly speaking being a claim under the warranties or indemnities provided by the sellers in the Contract) before 23 December 2011, then the buyer's solicitors were to pay the amount of that claim to the buyer. After 23 December 2011 any balance remaining in the retention account at that date was to be paid to the sellers – all straightforward and quite usual.

The buyer put forward six claims under the Contract, which totalled £293,159, and gave notice that these claims were to be treated as "relevant claims". The buyer's solicitors subsequently paid out the entire balance held in the retention account to cover these claims. The sellers, however, disputed this and claimed that only £21,236 of the claims put forward were justified and sought repayment of any amount paid to the buyer above this figure.

Crucially there was no requirement in the Contract for the buyer to provide details of or substantiate any "relevant claims". Neither was there any mechanism for the sellers to question and dispute the claims made from the retention account.

The sellers argued that in order for the Contract to produce the desired result between the parties, in relation to the retention account, a clause should be implied into the Contract that any relevant claim would be accurately calculated and based on factual substance.

The court rejected this argument and took the view it had no power to improve the bargain agreed between the parties, or decide what it would have been reasonable for the parties to agree. Here the provisions relating to the retention account were clearly intended to be favourable to the buyer, by allowing them to claim amounts alleged by them to be due, without being required to justify the deduction to the sellers in advance or obtain their consent to a payment from the retention account.

In the court's view, it would have been inconsistent with the commercially advantageous position of the buyer to imply an obligation on the buyer, to prove that the claims they put forward were accurately calculated and supported by facts.

This case is a good example that parties to an agreement should always consider at the start of any negotiations how they intend a contract to operate and agree this in advance with each other. This is especially the case in the event of a dispute between the parties. If the parties are agreeing a mechanism or procedure for resolving disputes, they should think through how it is intended the mechanism or procedure is to operate, and ensure that this is clearly incorporated into the contract and reflects what they have agreed. If for instance there is a requirement for a claim under the contract to be supported by certain written evidence then this should be stated expressly in the contract. Parties should not rely on the courts to imply terms in to a contract they have freely negotiated.

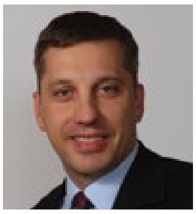
ROB SHAW
Senior Associate (Real Estate)
T +44 333 207 7771
rob.shaw@dlapiper.com

CONTACT US

ABOUT DLA PIPER'S MANUFACTURING SECTOR

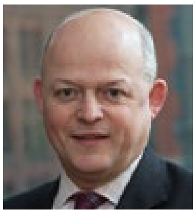
DLA Piper takes its expertise in and commitment to the manufacturing sector very seriously. We have built a strong reputation for supporting organisations engaged in all aspects of manufacturing: from industrial and advanced engineering, finished products and material solutions and industrial equipment through to aerospace and defence, automotive, chemicals and paints, food and beverage and shipbuilding subsectors. We are committed to understanding the markets in which our clients operate and the specific commercial challenges they face. Our team of lawyers has considerable experience of working with a broad range of blue chip manufacturing businesses, both in the UK and internationally, across a full spectrum of issues. For more information about our manufacturing capabilities, please email us on manufacturing@dlapiper.com, contact one of our specialists below or your usual DLA Piper contact.

Richard May
Manufacturing Sector Head
T +44 333 207 7751
richard.may@dlapiper.com



Peter Brook
Commercial
T +44 333 207 7305
peter.brook@dlapiper.com

Alan Chalmers
Employment
T +44 333 207 7897
alan.chalmers@dlapiper.com



David Gray
Litigation and Regulatory
T +44 333 207 7657
david.gray@dlapiper.com

Noel Haywood
Corporate
T +44 333 207 7022
noel.haywood@dlapiper.com

Nigel Howard
Real Estate
T +44 333 207 7743
nigel.howard@dlapiper.com

Kate Payne
Pensions
T +44 333 207 7239
kate.payne@dlapiper.com

Joely Richardson
Business Development Manager
T +44 333 207 7039
joely.richardson@dlapiper.com