(1) GATE MENA DMCC (2) HUOBI MENA FZC V TABARAK INVESTMENT CAPITAL LTD & ANOTHER DIFC CA-002-2023

Andrew Spink KC and Justina Stewart, Outer Temple Chambers

Some observations of general application arising from the Court of Appeal's judgment.

Uncertainty on whether consideration is required for formation of a contract under the DIFC Contract Law

The doctrine of consideration has been regarded as one of the more controversial issues in the law of contract in England and other common law jurisdictions. Indeed, Lord Goff recognised that English contract law is widely seen as deficient as it is perceived as being "*hampered*" by the "*unnecessary doctrine of consideration*".[1]

However, as recognised in *Industrial Group*[2], the DIFC Contract Law is based on the *UNIDROIT Principles of International Commercial Contracts*[3]. Art 35 of the DIFC Contract Law provides that "*a contract is concluded, modified or terminated by the mere agreement of the parties, without further requirements*". This mirrors Art 3.1.2 of the UNIDROIT Principles, in relation to which UNIDROIT has stated:

> ***"1. No need for consideration***
>
> *In common law systems, "consideration" is traditionally seen as a prerequisite for the validity or enforceability of a contract, as well as for the modification or termination of a contract by the parties.*
>
> *However,* ***in commercial dealings this requirement is of minimal practical importance since in that context obligations are almost always undertaken by both parties****. It is for this reason that Article 29(1) CISG dispenses with the requirement of consideration in relation to the modification and termination by the parties of contracts for the international sale of goods.* ***The fact that this Article extends this approach to the conclusion, modification and termination by the parties of international commercial contracts in general can only bring about greater certainty and reduce litigation."***[4]

Justice Black, while accepting that there is no express reference to consideration in the DIFC Contract Law, noted that there are "*also multiple references to "price" and "performance"*", and stated that he would "*prefer to leave the question of whether consideration is an element in the formation of a contract … to another occasion …*".[5]

[1] *White v Jones* [1995] 2 AC 207 at p263.

[2] *The Industrial Group Limited v Abdelazim El Sheikh EL Fadil Hamid* [2022] DIFC CA 005/006.

[3] *Industrial Group* at [111].

[4] See the Commentary on 2010 Principles at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/chapter-3-section-1/#1623694323415-30641944-9988 and, in particular Art 3.1.2.

[5] [222].

That the question as to whether consideration is required may now be up for debate will come as a surprise to many.

The importance of "control"

The Court accepted that the concept of control is the most apposite way of expressing 'possession' of a digital asset and further:

'Someone who exercises control over a crypto asset in which another has superior title, with the consent of that other, may be considered a custodian of the asset'.[6]

Justice Black's focus on "control" of a digital asset and understanding of the word "custodian" was consistent with Huobi's approach at first instance and, in particular, Huobi's contention that Tabarak's role was to act as a "custodian" of the BTC (Mr Thurner having admitted his understanding as to Tabarak's role and control over the BTC[7]).

Bailment over digital assets

Justice Black referred to the article by Professor Louise Gullifer KC, Hin Liu and Henry Chong, "*Client-Intermediary Relations in the Crypto-Asset World*".

Among other things, this article notes that under the current common law, it is impossible to create a bailment of an intangible asset (including crypto-assets), as it is impossible to have possession of intangible assets in common law jurisdictions and since possession is required for a bailment, it is impossible to have a bailment of intangible assets. Justice Black, however found (obiter) - and as Huobi had argued at first instance - that as a matter of statutory construction it is it possible to argue that the definition of bailment in the DIFC Law of Obligations can extend to the factual control of crypto assets, if factual control is to be regarded as, or equivalent, to possession.[8]

However, if it is accepted that the articles concerning bailment in the Law of Obligations are derived from the common law, and that the common law should therefore inform the interpretation of the word "possession" in those articles, the basis of Justice Black's conclusion might cause pause for thought.

Remedies

The question of whether a party is entitled to relief in the form of the digital asset *in specie*, as opposed to the value of those digital assets at the date of breach of contract is of significant practical importance for claimants in crypto cases.

Now that the matter will be subject to a re-trial, there is the opportunity to explore this important issue afresh. This can further be considered in light of the recently enacted *DIFC Digital Assets Law* and associated amendments to the *Law of Damages and Remedies.* The latter seeks to address, among other things, uncertainty or lack of flexibility in English law (as reflected in papers by the Law Commission of England and Wales and the UK Jurisdiction Taskforce of LawTech UK). Central to this will be a consideration of the meaning of the word "money" and whether BTC is "money" or analogous thereto.

For Huobi, like other claimants in Huobi's position, this has significant implications. Given the steep rise in the value of BTC since the theft, the value of the 300 BTC, as measured in USD, at the time of the alleged breach of contract will (barring any major downturn in the BTC price) be a fraction of that of 300 BTC following a re-trial.

Pure economic loss and assumption of responsibility in light of a defendant undertaking a specific task for a specific purpose

Justice Black considered principles governing findings of assumption of responsibility under the DIFC Law of Obligations.

The decision suggests that in future cases, when the DIFC Courts are required to determine whether a defendant has assumed responsibility to the claimant (even when the parties are commercial and not in a contractual relationship), the fact that a defendant has undertaken a specific task for a specific purpose for the claimant may play a pivotal role.

At first instance, Tabarak contended that BTC is not property and therefore Art 18 of the DIFC Law of Obligations could not apply as any loss suffered would be pure economic loss (in which case Art 20 of the Law of Obligations was relevant). Huobi contended (successfully at first instance and on appeal) that BTC is property (and so, the basis of Tabarak's defence in this respect failed), and in any event the requirements of Art 20 were satisfied. Art 20 applies in cases of pure economic loss and requires inter alia an assumption of responsibility by the defendant.

At first instance, Huobi relied on *Manchester BS v Grant Thornton UK LLP*[9] in support of the proposition that an assumption of responsibility arises where a defendant has

[6] [76].

[7] See the extract from the cross-examination of Mr Thurner at [198].

[8] [77]-[85].

[9] [2021] UKSC 20.

taken on responsibility for a particular task having a particular purpose and the scope of the duty of care assumed is governed by the purpose of the duty, judged on an objective basis by reference to the reason why advice (or by analogy a service) is being given. To put it another way, one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the materialisation of that risk.

Upon appeal, and relying on the post-judgment decision in *JP SPC 4 and another v Royal Bank of Scotland Ltd*[10], this theme was developed further. Huobi relied on the consideration by Lords Hamblen and Burrows JJSC in *JP SPC 4* of factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken. In particular, they stated that these included *"the purpose of the task or service and whether it is for the benefit of the claimant".*[11]

Huobi also relied on Lord Sales, speaking extra-judicially in "*Pure economic loss in the law of tort: the history and theory of assumption of responsibility*", noting in particular Lord Sales' following statements:[12]

> "***In a context where the defendant had a meaningful opportunity to negotiate over taking on the risk or refusing it, the concept of assumption of responsibility is the appropriate one to use****. […]*
>
> ***an assumption of responsibility will have occurred in circumstances where the defendant agreed with the claimant to take on a task, thereby inviting the claimant's reliance on them, in circumstances where it could have bargained to secure an alternative allocation of risk or could simply have declined to do it****.*
>
> *… Why in such cases is it the defendant rather than the claimant who should prima facie bear the risk if there is not an express agreement about how the risk is to be distributed. Absent agreement to the contrary, why shouldn't the claimant bear the risk when choosing to rely on the defendant when it was not required to?*
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> *… The answer to this is to be found in the old cases on the proper performance of tasks which the defendant volunteers to do for the claimant. By taking on the task, the defendant invites the claimant to rely on its due performance of that task. Imposition of liability is justified by the moral claim that if a person voluntarily undertakes to do something in these circumstances it is right that they be required to do it to a proper standard. Even when the undertaking is given gratuitously, the courts have made a judgment that the force in this moral claim overpowers the countervailing claim that ordinarily claimants should bear their economic losses in circumstances where they have not chosen to contract in positive terms."*

Justice Black stated, "*I confess that I might have been tempted to find a relationship akin to contract in the absence of a contract*".[13]

Regrettably, however, for Huobi, Justice Black reminded himself of Lord Reed's words in *Henderson v Foxworth Investments Ltd* that it did not matter, "*with whatever degree of certainty, that the appellate court consider that it would have reached a different conclusion*", what matters is whether the decision under appeal is one that no reasonable judge could have reached.[14]

Delay and procedural irregularity

In the English High Court, "*the unwritten rule applicable to both the Business and Property Courts and the Court of Appeal is that judgments should be delivered within three months of the hearing*".[15] The reason for this is widely accepted as being:

> *"A judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated."*[16]

[10] [2022] UKPC 18.

[11] *Huobi* at [219].

[12] [220].

[13] It is understood that this was also in light of Huobi's submissions on *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd* [2021] EWHC 590 (TCC), [2021] PNLR 19 in support of it being possible, in a commercial context, to find a duty of care, notwithstanding a lack of contractual relationship.

[14] [225].

[15] *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408; [2020] 4 WLR 55 at [78].

[16] *Goose v Wilson Sandford and Co* [1998] TLR 85 at [112].

In Huobi, the first instance decision was handed down 319 days (10.5 months) after the last day of trial. Apparently relying (at least in part) on the case being "colossal"[17], and despite ordering a re-trial, it was found that the delay was immaterial.

In a further ground of appeal, Huobi contended there was a serious procedural irregularity: while Tabarak's counsel was afforded **8 hr 54 mins** to cross-examine Huobi's main witness, the trial judge restricted the time available to Huobi's counsel to cross-examine Mr Thurner (who was the main witness of fact for the defendants) to **1 hr 50 minutes**. Despite this stark disparity, Huobi's identification of 22 issues upon which Mr Thurner needed to be cross-examined, the trial judge's appreciation of Mr Thurner being a challenging witness, and notwithstanding the Court's apparent reliance on the case being "colossal", this ground of appeal failed on the basis that "two hours or so would have been adequate time within which to have cross-examined each of the witnesses in this case" and Huobi had not tied the 22 issues to the outcome of the case or explained how the absence of cross-examination or further cross-examination on each issue rendered the decision unjust.

The Court did not identify whether it disagreed with any of the 22 identified issues.

This highlights the dilemma faced by appellants running such arguments if there is a real prospect of a re-trial. Must an appellant in such circumstances give, in effect, a list of the questions that would have been asked, and which would therefore be asked at a re-trial, alongside the responses that were hoped to be elicited? Obviously, by doing so, an appellant runs the risk that the respondent will then, if a re-trial is ordered, have had many months to prepare answers to the cross-examination. Or is it right that the appellant should be able to rely on the list of issues in dispute?

More Information

Andrew Spink KC has an extensive business law practice, specialising particularly in disputes or advisory work relating to the interpretation or breach of most types of commercial contract and trust deed, claims for fraud or breach of fiduciary duty, freezing injunctions and asset recovery, cross-jurisdictional issues, claims for damages and other relief in the context of pensions and other commercial trusts, banking & financial services, fintech and a wide range of other commercial contracts, professional negligence claims and company law and insolvency issues. Andrew was nominated as Legal 500 technology, data & crypto KC of the Year 2023 (in which OTC also won "set of the year"). He is listed as a leading KC in the UK in multiple practice areas including Crypto & Blockchain Assets (L500, Tier1); Pensions (L500 & Chambers, Tier 1); Commercial Dispute Resolution; Professional Negligence. Internationally, he is ranked as a leading KC in the Middle East in Commercial, L500 (Tier 1) and has for many years led teams of OTC barristers advising the DIFC governing body on a series of law reform projects including company law, trusts, and most recently and significantly the major initiatives in the fields of digital assets and smart contracts, banking and finance and securities leading to, amongst other things, the enactment of the ground-breaking DIFC Assets Law and Law of Security and consequential amendments to multiple other DIFC Laws.

Justina Stewart is recognised in the leading legal directories in multiple practice areas including commercial dispute resolution, banking & finance, financial services regulation and insolvency alongside Crypto & Blockchain Assets, L500 (Tier 1) and Cryptoassets, C&P (Band 1) and UK Bar: Middle East, L500 (Tier 1). Justina was nominated as Legal 500 Technology, Data & Crypto Junior of the Year 2023. Comments in legal directories have included 'phenomenally bright', 'an absolute delight to work with', 'a hard-hitting litigator. She is able to parachute into a dispute and turn it 180 degrees in favour of her clients', 'brilliant for banking litigation', a 'leading crypto barrister in the UK', 'an excellent eye for detail [who] always thinks outside the box', 'no matter how stressful the situation, Justina has a way of calming matters so that the focus is always on the issues at hand', 'impressive', 'strong, dynamic and commercial', 'great to use on difficult insolvency claims', 'a highly intelligent and tenacious litigator, she is also far more financially literate than most barristers', 'incredibly impressive and a force to be reckoned with' and 'a fantastic communicator', 'a phenomenal addition to any team when you have claims against banks' with 'outstanding legal acumen', 'proactive in moving difficult issues forward', 'a formidable advocate, whose oral and written advocacy are top notch', and 'extremely bright, responsive and a punchy advocate. She is excellent at forming a view on complex cases', 'A real team player and a pleasure to work with.' Her instructions typically involve matters which are noted for their complexity and novelty and which often involve allegations of fraud. Justina was instrumental in the drafting of the ground-breaking DIFC Digital Assets Law, the new Law of Security and the numerous associated amendments to DIFC Laws. Before coming to the Bar, she was an investment banker.

[17] [134].