



Drafting contracts – key lessons from 2025

In this briefing we look at the lessons to be learnt from some of the English contract law cases of 2025. The cases all turn on their own facts, but it is always useful to see how the courts approach particular points and the cases we have selected serve as useful reminders of some key issues for those drafting and managing contracts.

Formation

As in previous years we saw a number of cases in 2025 in which the courts had to decide whether there was a binding contract, and if so on what terms. The cases we have selected highlight the importance of being clear as to when a contract has been formed and what its terms are. Even where negotiations are carried out in an informal manner, the courts will use the same approach in determining the existence and terms of a contract.

The first case concerns the basic question of whether a binding contract existed at all in the context of a series of WhatsApp messages and emails.

In the other cases it was accepted that a contract existed between the parties, but disputes arose around the terms of that contract. The second case is the Court of Appeal decision in a case that we covered in last year's briefing concerning whether part of a payment provision was an unenforceable agreement to agree. The final case considers the "onerous clause doctrine" in the context of an insurance contract.

DAZN Ltd v Coupang Corp [2025] EWCA Civ 1083

FIFA was the sole owner of broadcasting rights for the 2025 FIFA Club World Cup, which it licensed to DAZN. DAZN was permitted to sublicense these rights in different territories and discussions began with Coupang, which operates a web-based video streaming service in South Korea. Negotiations between the parties were conducted over several months primarily via WhatsApp messages, telephone conversations and by email. In February 2025 Coupang sent an offer by email and DAZN replied:

"I am pleased to inform you that we will accept Coupang Play's offer for the FIFA Club World Cup 2025 we will start contract drafting and hope to share the draft for your agreement soon."

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The transcripts of all the cases we refer to are available free of charge from [The National Archives case law website](#)

Before an agreement was drawn up, DAZN received a higher offer for the broadcasting rights from a third-party and claimed that no legally binding contract with Coupang had come into effect.

The question for the court was whether a binding contract had been formed between DAZN and Coupang. At first instance, the judge considered that question as a preliminary issue and found that a contract had been concluded by email set against the background of communications between the parties by WhatsApp messages and conversations.

DAZN appealed on the basis that there was no contractual offer by Coupang, DAZN's email response was not an unqualified acceptance and there was no intention to create legal relations by the exchange of WhatsApp messages and emails because any agreement was subject to contract.

The Court of Appeal unanimously upheld the first instance decision and found that the parties had agreed all essential terms, including pricing.

The court held that DAZN's reply email was an explicit acceptance of Coupang's offer. The absence of "*subject to contract*" on the relevant emails reinforced an intention to be legally bound. Subsequent correspondence also suggested that a concluded agreement had been reached, particularly as it was common in the industry to be legally bound by agreed terms without a formal contract.

For further details see our litigation blog post [here](#).

KSY Juice Blends UK Limited v Citrosuco GmbH [2025] **EWCA Civ 760**

KSY entered into a contract to supply Citrosuco with a product known as "wesos", which is a by-product in the manufacturing of orange juice and concentrate. KSY was to deliver 1,200 metric tonnes of the product each year for a three year period, receiving payment from Citrosuco based on the mass and quality of the product. The supply contract provided that the first 400 metric tonnes supplied each year were subject to a "*fixed*" price of €1,350 whereas the final 800 metric tonnes were expressly described as:

"at open price to be fixed latest by December of the previous year".

In the first year of the contract, KSY delivered 400 metric tonnes of wesos, for which Citrosuco paid in accordance with the terms of the contract. However, Citrosuco declined to take delivery of a further 800 metric tonnes of wesos. KSY terminated the contract alleging that Citrosuco was in repudiatory breach of contract and claimed for €4.8 million based on the alleged contractual price of the undelivered 800 metric tonnes of wesos.

At first instance, the judge accepted that the evidence was clear that both parties intended to deal in the full quantity of 1,200 metric tonnes of wesos per year for three years. However, he found that there was no enforceable contract in respect of the 800 metric tonnes; it was merely an agreement to agree and therefore too uncertain to be enforceable (see our [2024 contract briefing](#)).

The Court of Appeal allowed KSY's appeal, finding that the contract was fully enforceable and that a term was to be implied to the effect that, in the absence of agreement, the price of wesos was to be fixed as a reasonable or market price. The court noted that where parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

Although there was no sufficiently transparent market for wesos from which the price could be determined, the Court of Appeal held that the price of wesos could be readily ascertained based on the price of another orange juice-based product.

For further details see our litigation blog post [here](#). The Supreme Court has refused permission to appeal.

MS Amlin Marine NV v King Trader Ltd & Ors [2025] **EWCA Civ 1387**

After a chartered vessel became grounded, an arbitration award of over US\$47 million was made against the charterer. As the charterer had by then become insolvent, King Trader, as the vessel's owner, sought to recover directly from the charterer's insurer under the Third Parties (Rights against Insurers) Act 2010.

The principal issue concerned the enforceability of a pay-first clause in the insurance policy, which limited the insurer's liability to circumstances where the insured had first paid the underlying claim. King Trader claimed that this provision fell foul of the so-called "*red-hand doctrine*".

The Court of Appeal described this principle, which it considered was better referred to as the "*onerous clause doctrine*", as applying where a particularly onerous or unusual term appears in one party's standard terms, but the other party is unaware of it. In such cases, the term will not bind the unaware party unless it has been fairly and reasonably brought to their attention. When the doctrine applies, the onerous clause is treated as not incorporated into the contract, or, more precisely, as having no effect.

The Court of Appeal noted that the questions of how onerous or unusual the clause needs to be and what amounts to fair and reasonable notice are questions of fact and degree to be decided on a case by case basis. However, the threshold for the doctrine to be engaged is high in commercial contexts.

In this case, the Court of Appeal found that pay-first clauses are not unusual in marine insurance. It also found that the relevant clause was not onerous, even though it had a serious impact given the insolvency of the insured charterer; the clause was not hidden away, the charterer was advised by professional advisers, and the parties were of broadly equal bargaining power.

For further details see our insurance blog post [here](#).

Practice points – formation

- Remember the basic requirements for a binding contract – an agreement, which is intended to be legally binding, supported by consideration, and sufficiently certain and complete to be enforceable.
- Remind deal teams to treat WhatsApp, text messages, and emails with the same caution as formal letters as there is a risk of unintentionally creating a binding contract without a formal written agreement.
- Beware of conducting detailed negotiations by phone or in person without any third party presence and without keeping any written record. Whenever possible, include all essential terms in a written agreement signed by all the parties before any obligations are performed.
- Although contract negotiations can be impliedly "*subject to contract*", clearly state the condition under which negotiations are carried out, for example by expressly providing that any agreement is "*subject to contract*".
- Be aware that, even if a "*subject to contract*" proviso has been used, subsequent conduct may indicate that a binding agreement has been reached.
- Ensure that any standard terms are expressed in clear terms, set out in a user-friendly way and clearly incorporated into the contract. Draw particular attention to any onerous or unusual provisions.

Interpretation

The first case in this section is a clear reminder that pre-contractual negotiations are irrelevant to questions of interpretation. The process of interpreting a contract involves balancing various principles but where the language used in the contract is clear and unambiguous, the courts will apply it, unless the balancing exercise shows greater weight should be given to one of the other principles such as the whole contract or the context or the commercial purpose of the provision.

The second case considered whether a notification provision in a remedy clause amounted to a condition precedent to the right to the remedy. We covered the first instance decision in our briefing last year (see our [2024 contract briefing](#)), focussing on the question of whether a limitation clause imposed an aggregate cap for all claims or multiple caps.

***Westfield Park Ltd v Harworth Estates Investments Ltd* [2025] EWCA Civ 1374**

Harworth Estates sold its holiday park to Westfield Park. The Coal Authority had imposed a "Zone of Influence" on part of the park, which prohibited any form of development within a 27-metre radius of two mine shafts located within the park. The initial offered purchase price of £3 million was revised down to £2.6 million, and deferred consideration was payable if:

"prior to the Long Stop Date the Coal Authority confirm in writing that the Zone of Influence is reduced ..."

After the sale had completed, the Coal Authority allowed static caravans to be placed within the Zone of Influence. Harworth demanded payment of the deferred consideration, but Westfield refused to pay as the size of the Zone of Influence remained unchanged.

At first instance, the judge concluded that the deferred consideration clause could not be given its plain meaning and that a "*more purposive construction*" of the clause would be required for it to make commercial sense. Several factors, such as pre-contractual negotiations and understanding, were deemed relevant in the proper construction of the clause, and he held that payment was due to Harworth given that the Coal Authority had permitted caravans to be placed within the Zone of Influence.

The Court of Appeal overturned the first instance decision, holding that the judge had failed to apply the well-established principles of construction. The judge should have reviewed the objective and natural meaning of the clause and should not have considered pre-contractual negotiations which are irrelevant to questions of interpretation.

There was no ambiguity in the language of the clause when taking its objective meaning, and it referred explicitly to a reduction in the Zone of Influence rather than permission for use within the zone. As the Zone of Influence had not been reduced, the deferred consideration had not been triggered.

For further details see our litigation blog post [here](#).

***Disclosure and Barring Service v Tata Consultancy Services Limited* [2025] EWCA Civ 380**

The parties entered into an agreement by which Tata agreed to take over DBS's legacy systems whilst developing new digital services. The project faced delays and defects, leading to disputes. Tata disputed DBS's claim for delay payments on the basis that DBS had not satisfied a condition precedent to such payment.

The relevant clause specified that "*if*" delays occurred due to Tata's default, DBS "*shall promptly issue*" a non-conformance report and it "*will then*" have various options including the right to delay payments. The issue for the court was whether the clause is a condition precedent, meaning that DBS's failure to issue a non-conformance report would prevent it from recovering approximately £1.5 million in delay payments.

The Court of Appeal upheld the first instance decision on this point. Whether a party has to comply with a specified obligation before being entitled to a remedy depends on the wording and the contractual context. Clear words will usually be necessary for a provision to be a condition precedent, although that does not mean that each such provision needs to expressly state that it is a condition precedent. The structure of the relevant clause, using "*if*" followed by "*then*" made it clear that the remedy was conditional on prompt provision of a non-conformance report. DBS's failure to provide the report meant that it was not entitled to delay payments.

For further details see our litigation blog post [here](#).

Practice points – interpretation

- Remember that there is always scope for differing judicial views on interpretation where clauses are ambiguous.
- Test the wording of your contract from a litigator's point of view and rectify any potential uncertainties. Where practical, demonstrate in the drafting the commercial rationale for key provisions.
- Use clear wording to create a condition precedent, such as using the "*if ... then*" structure seen in the *DBS* case.
- When drafting remedy clauses ensure that the relationship with notification clauses is clear and when managing contracts ensure that any notification formalities in remedy clauses are complied with.

Exclusion and limitation clauses

Exclusion and limitation clauses play a key role in the allocation of risk between contracting parties and often give rise to disputes. An important element in these disputes is the approach which should be taken when interpreting such clauses. The Court of Appeal decision below emphasises that exclusion clauses will be interpreted using ordinary methods of contractual construction and that previous decisions dealing with similar wording are generally of limited value. The fact that the court was split also shows the difficulties and uncertainties in interpreting such clauses.

***EE Limited v Virgin Mobile Telecoms* [2025] EWCA Civ 70**

EE and Virgin entered into an agreement by which EE provided Virgin with access to its 2G, 3G, and 4G mobile networks. Virgin agreed to use EE's network exclusively for its services. The agreement was subsequently amended to allow Virgin to use other networks to provide 5G services. EE claimed that Virgin breached the exclusivity clause by migrating non-5G customers to other network providers, resulting in lost revenue for EE. Virgin argued that the claim was excluded under the anticipated profits exclusion clause:

"... neither Party shall have liability to the other in respect of (a) anticipated profits; or (b) anticipated savings."

The question for the court was whether "*anticipated profits*" meant something other than the value to EE of the contractual performance Virgin would have provided but for its breach of contract. EE claimed that the exclusion clause only applied to losses of profit outside the agreement and did not apply to sums directly payable under the contract.

The Court of Appeal dismissed EE's appeal. The majority ruled that the relevant exclusion operated to exclude Virgin's liability for the profits that EE would have made on the contract even though the loss of those profits was caused by Virgin's breach of the exclusivity provision.

The Court of Appeal stated that exclusion clauses should be interpreted using ordinary methods of contractual interpretation, considering the natural and ordinary meaning of the words, the context, and the commercial purpose of the contract. However, in the absence of clear words, the court will assume the parties did not intend to waive their common law rights and obligations and exclusion clauses are not typically interpreted to undermine the contract's main purpose or create absurd outcomes.

In the view of the dissenting judge, the exclusion clause should not be interpreted to bar claims for lost revenue directly payable under the contract; "*anticipated profits*" should be interpreted more narrowly, excluding only profits outside the framework of the agreement between EE and Virgin. The term should not encompass the straightforward claim for lost charges due to Virgin's breach of the exclusivity obligation.

For further details see our litigation blog post [here](#).

Practice points – exclusion and limitation clauses

- Do not expect the courts to remedy a bad bargain – parties are free to allocate risk as they see fit and judges will respect that risk allocation if the wording is clear. So remember that the clearer and less ambiguous a clause is, the less likely it is to be litigated successfully.
- Use clear language to exclude any rights under common law as any ambiguity will be resolved against the party seeking to exclude the liability.
- Think about the losses that might be incurred by one party in the case of the other party's breach, and which party should bear liability for such losses; then test whether the contract achieves this result.
- Consider whether there are any particular types of loss which should be expressly excluded rather than relying on that particular type of loss coming within the generic grouping of indirect or consequential loss.
- Draft loss of profits clauses carefully and distinguish clearly between different types of loss of profit if only some are to be excluded.

Penalties

The case below concerned a default interest clause in a short-term loan agreement which provided that, in the event of default (including late payment), default interest accrued on the overdue amount at 4% per month compared to the standard (non-default) interest rate of 1% per month.

In 2024 the Court of Appeal overturned the first instance decision and found that the judge had not properly applied the test from the Supreme Court decision in *Makdessi v Cavendish* [2015] UKSC 67. Applying the first two limbs of the *Makdessi* test the Court of Appeal held that the default interest clause was (i) a secondary obligation; and (ii) intended to protect the lender's legitimate interest in obtaining repayment of the loan and interest, by the repayment date (see our [2024 contract briefing](#)). The case was then remitted to the trial judge to determine the third limb of the *Makdessi* test, namely whether, having regard to the lender's legitimate interest in the performance of the primary obligation, the default interest clause was "*extortionate, extravagant or unconscionable*" in amount or effect.

Houssein v London Credit Ltd [2025] EWHC 2749

The High Court outlined that there was a presumption that the default interest provision was a penalty clause as the same default interest rate applied on default of various primary obligations, not just the repayment obligation identified by the Court of Appeal.

In order for the provision to be enforceable it must not be "*extortionate, extravagant or unconscionable*" in respect of any of these obligations. The judge considered each one separately, before concluding that the lender's legitimate interest in enforcing each of the counterparty's primary obligations was sufficiently strong to justify the default interest.

He reached this conclusion despite finding that the 4% default rate was at the "*upper extremity of the band of commercially acceptable rates*". He also noted that the claimants were experienced, well advised, and had other lending options available to them, meaning that there was a strong presumption that the parties themselves were the best judges of what was legitimate.

For further details see our litigation blog post [here](#). The claimants have applied for permission to appeal.

Practice points – penalties

- Consider having varied default rates according to the severity of the default to avoid the risk of the clause being construed as extortionate. If a fixed default rate is to apply to various types of default, ensure that the rate is not extortionate relative to each type.
- Maintain records of the commercial rationale for each category of legitimate interest, specifically the risk implications considered, to support enforceability of the clause.
- Remember that any provision in a contract which deals with the consequences of a breach could potentially be a penalty, not just a provision requiring the payment of a specific sum on breach, but also the removal of a right to receive a sum or a requirement to transfer an asset at less than full value.
- Where the parties are of comparable bargaining power and both legally advised it will be much harder to argue that a consequence of breach is an unenforceable penalty.

Good faith

The two cases covered in this section are good illustrations of the different aspects of good faith in contracts: (i) express provisions requiring the parties to act in good faith; and (ii) implied duties of good faith. In the first case the court had to consider whether one party's actions amounted to a breach of an express good faith clause. The contract in the second case did not contain an express obligation to act in good faith so the court considered whether such a clause should be implied into the contract.

Matière SAS v ABM Precast Solutions Ltd [2025] EWHC 1434

Matière and ABM sought to jointly bid for a sub-contract from the main contractor in the HS2 tunnelling works. This joint bid was principally governed by two agreements between the parties. When the joint bid failed, Matière proceeded alone to secure a contract with the main contractor for the same work.

When Matière claimed for outstanding sums from ABM, ABM counterclaimed for Matière's breach of express good faith obligations in the agreements, including by criticising ABM's plans for the works in discussions with the main contractor. ABM alleged that this caused the collapse of the otherwise competitive joint bid.

The judge found that Matière had indeed breached its obligations of good faith under the agreements. In determining the nature of a duty of good faith, the court stressed that the "core meaning... is to act honestly", avoiding any "conduct which would be regarded as commercially unacceptable to reasonable and honest people". In determining the scope of the duty, the court highlighted that particular consideration must also be given to the duty's specific context, which in this case mainly revolved around the following clause:

"ABM and Matière shall co-operate and collaborate with one another in accordance with the terms of this Agreement and in the course of their performance of their obligations pursuant to any associated [professional services contract] each of ABM and Matière shall act in good faith toward the other and use reasonable endeavours to forward the interests of the co-operative enterprise."

Here, the court deemed the context widened the duty to cover fidelity to the bargain, which Matière's actions had breached as they were dishonest and commercially unacceptable.

Despite having successfully established a breach of the express good faith provision, ABM's counterclaim failed for lack of causation. The court found that, whilst the joint bid's chances of success indeed collapsed over the process, Matière's actions had no tangible impact, and the failure of the bid was instead due to existing concerns held by the main contractor about the cost, efficiency, and quality of ABM's work.

For further details please see our litigation blog post [here](#).

Ellis & Ors v John Benson Ltd [2025] EWHC 2096

The twenty claimants were former franchisees and driving instructors who initiated proceedings for breach of contract against John Benson Ltd (JBL), a regional driving school franchise. Most of the claimants had little or no prior experience as driving instructors or in operating their own businesses. Each claimant had entered into separate franchise agreements with JBL. The contracts were highly restrictive, prohibiting the franchisees from subcontracting, using personal marketing, setting their own fees or from terminating early.

In late 2020, the claimants each terminated their agreements. The claimants alleged that the agreements contained implied terms of good faith and fair dealing, which JBL breached through oppressive conduct, including intimidation and discriminatory remarks. JBL denied any implied obligations of good faith and counterclaimed for unpaid fees.

The agreements contained no express obligation of good faith, nor any clause excluding such terms. Consequently, it was for the court to decide whether such terms were implied. Applying the test from *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, the High Court considered whether reasonable parties would regard such terms as necessary for business efficacy or so obvious as to go without saying. While franchise agreements do not generally carry an implied duty of good faith, the court found these contracts were "closer to an employment relationship than a commercial contract". The court held that the significant imbalance of bargaining power, restrictive terms, JBL's control over the franchisees' business activities and the length of the agreements justified implying a term of good faith and fair dealing. The court concluded that it was both necessary and obvious to imply such terms for commercial coherence.

The court refused to establish a blanket rule that all franchise agreements carry implied good faith obligations as a matter of law, but found that, given the circumstances of the case, implying such a term was appropriate. The court went on to rule that JBL's conduct amounted to a repudiatory breach, entitling the claimants to terminate their agreements.

The Court of Appeal has granted permission to appeal against this decision.

Practice points - good faith

- Consider addressing the issue of good faith expressly, particularly in long term relational contracts, and, where appropriate, seek to limit or exclude any implied duty of good faith.
- Ensure precise drafting specifying the actions required to satisfy duties of good faith to mitigate their versatility; as a baseline, a duty requires acting honestly and avoiding conduct which reasonable and honest people would deem commercially unacceptable - but, depending on a given duty's wording and context, it can extend to include broader obligations, such as fidelity to the spirit of the bargain, potentially limiting a party's freedom to act in its own best interests.
- Remember that duties of good faith in collaborative contexts may restrict engagement with third parties; transparency and coordination between the parties in external dealings are essential to avoid breaching the duty.
- Remember the clear demarcation between breach and causation. In assessing whether a duty of good faith has been breached, the court focuses on the *potential* effect of the conduct at the time it occurred - not on the ultimate outcome. The court will then assess whether the breach in fact caused the actual loss that materialised, so proving breach alone is insufficient; a claimant must also show that the breach has caused the loss claimed.
- Keep a record of actions taken to satisfy obligations to act in good faith.

Termination

Cases on termination can generally be divided into three categories: (i) those examining contractual termination clauses; (ii) those concerning termination for repudiatory breach at common law; and (iii) those considering the interaction between contractual and common law termination rights, often related to the level of damages which the terminating party can recover. The three cases that we discuss below, all Court of Appeal judgments, fall into each of these categories.

In the first case the issue was whether a clause which entitled the buyer of a vessel to compensation for its "loss" on exercising a contractual termination right included the right to loss of bargain damages, even if the failure which triggered the clause was not a repudiatory breach of contract.

The second case concerned a contract for the supply of face masks during the Covid-19 pandemic. The issue was whether the customer was entitled to terminate the contract despite its earlier repudiation, in circumstances where the innocent party did not accept that repudiation and subsequently failed to comply with its own continuing obligations.

The third case considered the principle that a party will not be held to have waived its right to terminate a contract under common law unless it knows that it has that right; the issue was whether that principle also applies where the right to terminate arises under an express contractual provision.

***Great Asia Maritime Ltd v Orion Shipping and Trading LLC* [2025] EWCA Civ 1210**

A contract for the sale of a ship required the seller to give notice of readiness to the buyer by a certain date, failing which the buyer would be able to cancel the contract. If that failure was due to proven negligence, the seller would be required to "make due compensation to the Buyers for their loss and for all expenses together with interest".

The seller did not give the required notice by the specified date, and the buyer therefore terminated the contract and claimed its loss from the seller. The value of the ship at the date of cancellation was \$1.85 million more than the contract price. A key issue was whether the buyer could recover the \$1.85 million as loss of bargain damages.

In arbitration, the tribunal found that, by failing to give notice in time, the seller was not in repudiatory breach of the contract, but that the failure was attributable to negligence and that it owed loss of bargain damages as a result.

Overtaking the High Court's decision (which reversed the arbitral tribunal's decision), the Court of Appeal found that the ordinary and natural meaning of "loss" in the context of the relevant clause included loss of bargain as the buyer did not get the ship for which it had contracted.

For further details see our litigation blog post [here](#). The seller has applied to the Supreme Court for permission to appeal.

***Advanced Multi-Technology for Medical Industry & Ors v Uniserve Limited* [2025] EWCA Civ 1212**

During the pandemic, the parties entered into a contract for the supply of 80 million face masks to be made available for collection at the supplier's factory in accordance with a delivery schedule. Time was expressly "of the essence" for the supplier's delivery obligations, meaning that any failure to meet the delivery dates would entitle the customer to

terminate (and, if appropriate, claim damages). However, time was not of the essence for the customer's obligation to collect the masks.

There were problems with production and delivery, and the customer sent an email in June 2020 purporting to terminate the contract. The supplier did not accept this as a valid termination and continued to perform its obligations. When the supplier later complained that deliveries had not been collected, the customer reiterated in a July email that the contract was terminated.

The supplier brought proceedings claiming damages for non-acceptance of the 77 million masks remaining for delivery under the contract. The customer argued that it had validly terminated the contract, and in any event the supplier was not in a position to perform the contract and therefore not entitled to damages.

At first instance, the judge found that at the time of the June email, the supplier had complied with its contractual obligations, meaning that the customer's purported termination in the June email was a repudiatory breach by the customer. However, the judge found that the supplier had accepted the repudiatory breach, contrary to the supplier's own case that it had not accepted the repudiatory breach and had instead kept the contract alive.

The Court of Appeal found that the supplier had not communicated any acceptance of the customer's repudiatory breach and the contract therefore remained in force, meaning that both parties remained subject to their ongoing obligations and liabilities. By the time of the customer's July email the supplier was in breach of its delivery obligations. Accordingly, the customer was entitled to terminate the contract.

For further details see our litigation blog post [here](#).

***URE Energy Ltd v Notting Hill Genesis* [2025] EWCA Civ 1407**

URE Energy entered into a four-year electricity supply contract with Genesis Housing Association which later amalgamated with another entity to form the defendant, NHG. Seven months after the amalgamation, URE Energy gave notice to terminate relying on a provision of the contract which allowed it to terminate if:

"[Genesis Housing Association] passes a resolution for its winding up which shall include amalgamation, reconstruction, reorganisation, administration, dissolution, liquidation, merger or consolidation ...".

NHG claimed that the URE Energy had elected to waive its termination right by continuing to perform the contract long after the amalgamation had taken effect. At first instance, the judge found that although URE Energy was aware that the amalgamation had taken place it was not aware that the amalgamation gave rise to a termination right. For further details see our [2024 contract briefing](#).

On appeal, NHG acknowledged that, when a repudiatory breach occurs, the innocent party will not be taken to have elected to affirm the contract unless it knows that it has the right to terminate. However, it argued that the same principle does not apply in relation to contractual termination rights as a contracting party must be deemed to have knowledge of the express terms of the contract. The Court of Appeal rejected this argument, finding no reason to distinguish between termination rights that arise out of an express contractual provision and rights that arise from common law.

For further details see our litigation blog post [here](#).

Practice points – termination

- Think carefully about the interaction between the right to terminate at common law and any contractual right to terminate and ensure that any termination clause clearly sets out the grounds, mechanism, and consequences of termination.
- Consider carefully any potential right to terminate and the possible consequences of termination. Where appropriate, take legal advice before acting. Consider all possible interpretations of any relevant contractual provisions rather than proceeding on the basis of the most favourable interpretation.
- Remember the dangers of terminating for repudiatory breach – a court may hold that the breach you relied on is not repudiatory but that your termination is itself a repudiation of the contract.
- If your counterparty commits a repudiatory breach remember that you have two options: you can either accept the breach, which has the effect of bringing the contract to an end, or you can affirm the contract, which means that the contract continues and you must perform all of your obligations under it.

Key contacts



Sarah Hawes
Head of Corporate Knowledge, UK
T +44 20 7466 2953
sarah.hawes@hsfkramer.com



Robert Moore
Partner
T +44 20 7466 2918
robert.moore@hsfkramer.com



John Taylor
Partner
T +44 20 7466 2430
john.taylor@hsfkramer.com



Julie Farley
Knowledge Lawyer
T +44 20 7466 2109
julie.farley@hsfkramer.com



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