GENERAL COUNSEL UPDATE (Session 1)

CONTRACT LAW UPDATE AND SMART CONTRACTS

Katie Kinloch

Good morning everyone and welcome to the first of our GC update seminars for 2021. I'm Katie Kinloch and I'm being joined by today's speakers, Jonathan Davey and William James, both partners in our commercial group. As regular attendees will know our GC update seminar is usually a full day of sessions and networking in our offices, of course this year we're doing things a little differently by holding it as a series of webinars over the first four Tuesdays in March. Today we have a firm favourite in the GC update line up, an update on recent contract law from Jonathan, following that Will will be introducing us to the world of smart contracts. Please ask questions as we go along, using the on-line functionality. I'll be monitoring these and putting them to the speakers at the end of their respective section of the seminar as far as time allows. Finally, just to let you know we are making a recording of this webinar and therefore that's why you're all automatically placed on mute and so handing you over now to Jonathan, thank you Jonathan.

Jonathan Davey

Thanks Katie. Good morning everybody. I really liked that intro, a firm favourite and Will and best still he's on mute so he can't even come back on that. Welcome everybody. For those of you who have attended one of my talks before you'll know that the plan is to look at developments largely over the last couple of years. I'm not planning to take you through every single case, rather what I want to do is pick on those that I think have most relevance to us as people drafting and negotiating commercial contracts and my aim which I'll test out with you at the end is to give you something that you can actually take back to your desk and use today so hopefully I'll achieve that objective. There's a list of the things I'm going to cover in this talk, I'm not going to go through that now but hopefully you can already see something there that wets your appetite but I thought it would be wrong to start off without a reflection on Covid and force majeure.

Many clients during the Covid crisis I think have found that their standard contracts are a bit of a blunt instrument or have not been fit for purpose in the crisis. Why is that? Well, typically clauses deal with inability to perform rather than no longer having a need for the services concerned. Think, for example, of a retailer buying goods for re-sale, it's not that they can't perform the contract, that they can't take delivery or pay, it's that they just don't have a need for those items to sell in their stores because the stores aren't open. Well think of the Addleshaw Goddard canteen it's not so much that we can't perform it's that there's nobody in the office to take the benefit of the catering services and we saw an example of that type of issue in practice in the European Medicines Agency and Canary Wharf case in 2019. The European Medicines Agency tried to get out of their lease in Canary Wharf because Brexit meant they had to leave the UK but that didn't amount to frustration and I'm pretty sure it wouldn't have amounted to force majeure either. If you want a useful case by the way to see the details of frustration then the Ed Winton case that I've mentioned there is a useful starting point.

I've not tended to find that the problems have been about the breadth of the force majeure definition but I am now adding the following things to my definition. An express reference to epidemic and pandemic although I'm not sure I've worked out exactly what the difference is yet but very importantly compliance with guidelines. You'll remember that early in the crisis closing offices for example or work places wasn't

a matter of law, it was a matter of government guidance. Well does that amount to force majeure? Is that something beyond your control or are you making a choice to comply? I think it's appropriate that force majeure clauses should be modified so as to refer to compliance with government guidance and best practice as well as compliance with legislation. Another problem, it's not always been clear who's been FM'd. Think of my Addleshaw's canteen example again, is the person who's suffering force majeure the caterer because they can't open the premises because their staff can't travel in on public transport or can't come into the office or is it Addleshaws because our staff can't come into the office because of the Covid restrictions? So there's a real question sometimes as to who the person is who's claiming force majeure and we've also found clients reluctant to plead force majeure because often the sting in the tail is a right for the other party to terminate after say 60 days and in many cases clients would rather take their chances and argue about modifications needed to make the contract work rather than start down a slippery slope which might lead to termination.

Others have been inventive in their approach to dealing with the crisis so health and safety law, of course, might well have meant that a company, for example, would not want to deliver personal services face to face so that it could claim if there was a compliance with laws clause in the contract and perhaps even if there wasn't, that it wasn't complying with its obligations simply because it was complying with law, it wasn't pleading force majeure. Some clients have rights in their contracts particularly in standard terms for parties in a stronger negotiating position to delay delivery or even alter payment terms to take account of Covid but be aware of the legislation on late payment of debt if you're a larger business claiming to be entitled to pay at some distant point in the future. It may surprise you to hear that there are some cases in which, sorry this slide's playing up a little bit, in which although there's a force majeure provision there's no obligation to perform so I've seen this in some sports sponsorship contracts for example where there is a force majeure clause but maybe the team concerned isn't obliged to play the games or attend the races or whatever it is that are involved so the force majeure never becomes relevant.

We talk briefly about frustration already but it's a very narrow doctrine and the Salam Air case that I've mentioned there from last year is a good example of this. Salam Air, in that case an airline couldn't operate air services because of Covid but the court said that didn't frustrate the leases. Nothing was preventing the airline taking the aircraft and paying the rentals. It may have been that the purpose was frustrated but that didn't amount to frustration on the terms of that contract.

Looking forward what are seeing out there? Well many clients have already amended standard terms to reflect some of the points I've mentioned. On the other side of the fence suppliers are very wary of just signing up and I think as I say later on the slide that the realisation is that this isn't just another boiler plate provision, that it actually has very serious consequences and if the world isn't going to be free of Covid for quite some time the reality is that our contracts will need to deal appropriately with it going forward. Some clients have turned to MAC or may (8:15) clauses that's material adverse change or material adverse effect. A case dealing with that issue in a multibillion pound corporate deal last year was the Travelport and Wex case there. It refers to and summarises the US case law on this issue because those clauses are much more common in the US but in that case it was held that the purchaser of a business couldn't get out of the deal on the basis of a material adverse effect provision and an example of Covid and force majeure and frustration is the Dayah case I've mentioned there. The final question, I think I may have written this before we had a second or third wave but is it arguable that after the experience we've had with Covid if we're talking about events beyond the reasonable control of the party liable to perform there would be an expectation now that it should have taken steps to mitigate or obviate the effects of Covid and therefore perhaps not to be able to rely on the force majeure provision.

I'll pause there for a moment in case anybody wants to send any questions through but I think we're largely looking to questions at the end.

I'm just having a little trouble with the slides please bear with me a second. There we go.

If you've been to one of these talks before you'll have heard me talk about the C change that I think's taken place in commercial contracts in the past five years or so. There was a period while Jonathan

Sumption was in the Supreme Court when the court took a very interventionist approach to cases in this area. It took a lot of cases on in the commercial contract space and a lot of things we'd assumed were set in stone for some time had been swept away. I think it's fair to say since Jonathan Sumption left the court and went back to writing treatises on history we've seen less intervention but the ripples from these cases have continued through the years and predictably the lower courts have followed the lead given to them by the Supreme Court so Arnold and Britton said we're going to take a less interventionist approach to contract interpretation and the key one of the six principles laid down in that case is the one I've quoted on the slide, reliance placed on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language used. In other words, if the words are clear we'll give them effect even if that might suggest that one of the parties has done something that has turned out to be a bad bargain or was commercially inadvisable or for us as people drafting commercial contracts, maybe that translates as if you get the drafting wrong don't expect the court to come to the rescue and the M&S and BNP Paribas case is the equivalent to Arnold and Britton for implying terms, of course, there should be a higher test for implying a term. In Arnold and Britton at least we're interpreting the words on the page. In an implied terms case the party concerned is arguing the words that aren't there should be added so the three cases I've next mentioned on the slide we're going to look at in a little more detail and I think you'll see those ripples from those two cases from the Supreme Court following through there. Just before leaving this C change point if you want further evidence of that then the changed approach to liquidated damages and penalties in the Beavis and El Makdessi cases are an example of that, as is the Supreme Court's decision in Rock Advertising regarding so called non clauses, no oral modification clauses, clauses that require amendments to contract to be writing or to be in signed writing or the amendment to take effect.

So that's the C change I'm suggesting has happened, let's look at some of these cases then. Sara and Hossein against Blacks Outdoor, interesting case because here there was a contractual provision in the lease that allowed the landlord to certify the service charge payable and the landlord's certificate of the service change was stated in the absence of manifest or mathematical error or fraud to be conclusive. In the High Court a distinction was made between matters of fact which it was thought were capable of being determined conclusively by the landlord and matters of law it was said were matters for the court. Well the Court of Appeal overturned that first instance decision looking to the natural meaning of these words in accordance with Arnold and Britton and the court said that meant that on the wording of this provision it was open to the landlord to certify conclusively matters of both fact and law and the court re-affirmed the Arnold and Britton position but the courts can be very slow to reject the natural meaning of a term even if it appears very imprudent for one party to have agreed to it. This is a lease case but, of course, I'm mentioning it because it has application in our commercial contract space not just in real estate.

The 2Entertain case arose out of the Croydon riots some years ago and due to Sony's negligence and poor stewardship of a warehouse tens of millions of pounds of DVDs owned by 2Entertain were destroyed. We end up in the TCC though on the question of whether Sony's liability extended to more than just the cost of re-manufacturing the DVDs to the lost profit that related to their sale and this in turn takes us to one of those vexed issues which is the meaning of the phrase consequential and indirect loss. You'll see we'd had a long line of cases that said that that phrase referred to the second limb of Hadley and Baxendale, you'll remember the first limb is loss that flows naturally from the breach, the second limb is loss which doesn't flow naturally from the breach but was in the contemplation of the parties and I've given you the example there of the Hilton Mini Bars case which is one of those historic line of cases and the one dearest to my heart probably. The problem, of course, with this phrase is that most business people assume that it excludes loss of profit but it doesn't, according to that line of cases at least it excludes what is usually a small part of the total loss and not loss of profit but the fly in the ointment was a case called Star Polaris which relying on a previous Court of Appeal decision which nobody seemed to have heard of said no well this phrase wouldn't always mean the second limb of Hadley. In the Star Polaris case the court said it could be construed so as to exclude loss of profit. Well no case subsequently followed Star Polaris and finally the 2Entertain case has taken us back to the

traditional line and said that generally this phrase would mean a second limb of Hadley and Baxendale so a victory on that front for 2Entertain but unfortunately the court also upheld a cap in liability which meant that it was something of a pyrrhic victory. Why is it important, why am I being triumphalist about going back to the previous law, well because all of us have been drafting contracts for years and years based on that long line of authority and assuming that this phrase meant second limb of Hadley not loss of profit so I think it is important for legal certainty and for the sanctity of those bargains that we've gone back to something approaching the line taken in that previous group of cases but just a word of caution, what this case doesn't do is to give a legal meaning to that phrase, it will still be a matter of interpreting the meaning of the words in each case, in each contract against the surrounding circumstances.

Well what are the practical points for us as people drafting and negotiating contracts? Well the clear answer is avoid using these words. If you mean loss of profit say loss of profit, much clearer. The standard AG provisions, terms and conditions, say loss of profit, income production or accruals which is much clearer than consequential and indirect loss. As a slightly more left field suggestion if you're the party likely to be liable it may be that you want to parrot the wording from Star Polaris and say that the clause is intended to be a complete codification of the parties' rights and obligations and maybe you will be able to argue for the broader definition rather than the narrower one.

The Yoo Design case, this is a case in the High Court relating to design services for apartments in Singapore. The way the parties had drafted the contract was that Yoo Design didn't just get paid a lump sum for the design services, it got paid against the sale of the apartments. Problem, significant real estate downturn in Singapore so the properties were completed but they weren't sold and the developer decided that all it could do really was to rent the apartments out so the question facing the court was should a term be implied that the property owner must market or sell in order to enable Yoo Design to achieve their fee. It won't surprise you to hear that following the BNP Paribas case the court said no it wouldn't imply a term, it was giving a narrow view of the circumstances in which terms would be implied and those are that implying a term here wasn't necessary to give business efficacy to the contract and that if the hypothetical officious bystander had intervened there would have been a punch up rather than agreement, the parties wouldn't have agreed so even though the non-implication of a term meant that the designer would never get paid the court said that that was the position the parties had agreed. Indeed it said to imply a term would run counter to the payment scheme in the contract and that didn't speak to the implication of a term, quite the opposite. The court said in any event that one reason the officious bystander's intervention wouldn't have sorted things out is that, of course, the develop had a lot more at stake here than simply the design services agency's fee so it was very unlikely that they'd have agreed to do something that affected their whole investment in the development just to enable Yoo Design to, what was in comparison, a much smaller fee. The court said by the way that a no warranties provision on the terms of the contract wouldn't have been sufficient to exclude an implied term if the court had otherwise been minded to imply one so that's quite an interesting point just to salt away and a reminder as we said when we looked at the C change earlier that the court won't intervene even if an intervention might on one argument give rise to a fairer outcome. There is an appeal being heard in that case this month so watch this space.

The Dodika case you may have seen mentioned in some of the legal journals, quite a surprising decision really. This was a Summary Judgment Application on a one billion dollar deal and provisions of the Share Sale and Purchase Agreement. There was provision for some of the purchase price to be held in escrow pending resolution of any possible claims including tax claims and the key provision said if the buyer gives written notice to the warrantor stating in reasonable detail the matter which gives rise to such claim the nature of such claim and so far as reasonably practical the amount claimed in respect thereof on or before the relevant date then the amount held in escrow would be retained. The court in this case said that notice given by the buyer to the warrantors was ineffective and so the fifty million dollars could be released from escrow. Why is that a surprising conclusion? Well because the warrantors were well aware of and involved in the process leading to the claim for payment of tax and no doubt the buyer thought I don't need to give loads of detail because they're already aware of the detail. I can almost imagine one of our commercial colleagues saying do we really need to send this

three or four page draft letter? They know exactly what's going on, all of this detail seems superfluous. Well seemingly not. The court said the purpose of the notice wasn't merely to enable the recipient to make financial provision for the claim but to enable it to deal with the claim in some manner and/or to take legal advice. The letter was insufficient for this purpose. It gave details of the claim but not of all of the surrounding circumstances so it wasn't sufficient and so the notice was invalid so a really important point for us if we're drafting contractual notices. Have we touched the four corners of what's required? Have we given all of the notice that's required? I suspect these types of notices going forward will get very much longer than they have been hitherto particularly if fifty million dollars is the sum at issue.

Interesting case here, Energy Works (Hull) against MW High Tech Projects. This is a case to do with assignment, the Energy Works in Hull is a waste to energy plant that turns refuse into electricity. There was a very typical structure at play here, an employer, a contractor and a sub-contractor and as is not uncommon in these situations in certain circumstances the employer was entitled to take an assignment of the sub-contract. Well there were difficulties. The employer did take an assignment. It also sued the contractor for losses as a result of alleged defective work and delay by the contractor but then, of course, the contractor wanted to pass the parcel on to the sub-contractor for the losses claimed against it by the employer. Problem, you've just assigned that contract, can you now bring a claim based on that contract for your loss? Well the court said no, in the circumstances here assignment meant assignment on all accrued and future rights against the sub-contractor and so the contractor had perhaps unwittingly done away with, given up it's rights to sue under the contract against the sub-contractor. The court said on the facts this wasn't a novation and it gave us some useful pointers on both assignment and novation. Of course, generally we can assign the benefit but not the burden without consent. Absent clear contrary intention the court said assignment means both accrued and future rights. Assignment of future rights without accrued rights is possible but we need clear words so we're going to have to be careful in thinking through the various scenarios if we allow one of these assignments and I suspect generally entities in the position of the contractor here will want to pass on future rights but perhaps not past rights or at least will want to retain the ability to sue the sub-contractor. The sub-contractor may say well I don't want to end up with potential liability to two people, it's fair enough that the employer is suing me rather than the contractor but I don't see why I should suffer claims from both. The court also looked at a principle called conditional benefit. In some cases the court said you can only take the benefit of a contract where you accept some of the burden where the obligation was inextricably linked to the benefit assigned but the court said that wasn't the case here and by the way the parties' labels were not conclusive so be aware of the unintended consequences of these rights on behalf of the employer in this case to take an assignment and think through the effects of that before you agree to it.

Examples in contracts, I'm a big fan of putting examples in contracts. Maybe it's because I did maths rather than history for A level but I would much rather see an appendix with an example in it than simply a long chain of words in the front end of the document. If you're interested in this topic we did an E-alert on it some time ago which is available on our website. Having said what I've said and having said positive things about examples here are two cases that show that there can be problems. The more recent case is the Altera case from last July but there was an earlier case in the Court of Appeal called Sutton and Rydon. It's odd incidentally that the High Court looking at examples in Altera didn't refer/wasn't referred to the Sutton case at all. Just to mention the Sutton case very briefly cause it's sort of outside our time scale, here the Court of Appeal overturned the TCC in finding that examples in a contract were binding and not merely illustrative. The problem was that these examples were stated not to be binding but on the other hand they contained provisions called maps which were needed to operate certain other provisions in the contract so if the court had held that the maps were indeed merely illustrative and not binding large chunks of the contract would have been ineffective so the court decided it was doing less violence. It was better reflecting the parties' intentions despite the fact that the maps were said to be non-binding, in fact to give them effect and we ended up in a similar place really in the Altera case which related to a charter party, whatever that is, for an oil production platform. Slightly different facts here, there was a higher adjustment formula in the front end of the contract that allowed the higher payment to be adjusted and that was set out in narrative form in the front end. Attached were

two worked examples and a provision in the main body of the contract gave precedence to the main body over the appendices but the problem was that the worked examples included in them steps that weren't reflected in the formula in the front end of the contract so the court faces the Sutton and Rydon type dilemma. Do we override what the contract says about the precedence between the main body and the examples or do we accept that the formula in the front end applies even though clearly the examples contemplated are the steps? The court referred to Arnold and Britton unsurprisingly. It said it wasn't sure that anything had gone wrong in the drafting and therefore there was no role for the inconsistency clause to play. I detect a bit of judicial slides of hand of there but I suppose the thing I do agree with is the quote there from the court, it seems inherently more probable that the parties true bargain is to be found in the worked examples because, of course, the parties had applied themselves to the worked examples. There was no question of this being a standard clause that had just unthinkingly been dropped in and, of course, there were two examples here so it was all the more likely to be the case that the parties had focused on the worked examples rather than on the wording in the main body so that's examples in contracts.

Changing tact likely Court of Appeal decision from April last year, I've asked what makes a wrong right. Probably one of the most common provisions we all see in nearly every contract we draft is the termination provision that says the innocent party can terminate if there's either an irremediable breach or, more likely, a remedial breach that isn't put right within a period of notice from the innocent party and the Bains and Arunvill case is interesting because it shows the court's approach to the latter situation where there's been a remediable breach and the question then is how does one go about remedying that breach? Mr Bains was providing financial structuring services to Arunvill and the dispute arose. Mr Bains wrote to Arunvill and said he was going to refuse to perform further and unsurprisingly that resulted in a notice under a clause of this type that required him to recommence performance failing which Arunvill reserved the right to terminate. Mr Bains had second thoughts and his solicitor wrote to Arunvill saying Mr Bains will recommence performance but before he recommenced performance Arunvill terminated arguing that the relevant period had expired without Mr Bains recommencing performance so the question that came in front of the Court of Appeal was if you'd been given one of these notices is it enough simply to lift the threat to fail to perform or do you have to actually recommence performance? The court here upheld the High Court and said actual performance was necessary. It wasn't enough for Mr Bains simply to say I give up, I'll start re-performing. He actually had to start performing and the reason behind that was the court said at the time the breach notice was served he had stopped performing so to remedy that breach it wasn't enough simply to lift the threat, he must actually restart performance so we assess breach at the time the notice is served. The court expressly left open, unhelpfully for us, the question of what would have happened if Mr Bains had either partially or a de minimis basis commence reperformance so the only safe thing after this case if you have received one of those notices is to recommence performance in full and be noisy about it.

If you've heard about one case in the last 18 months in Our Space it's probably Athena and Superdrug, it made headlines across the legal world but not necessarily a massively surprising decision. What was going on, well Superdrug had been talking to Athena about buying rather a lot of branded toiletries from them, £1.3m worth to be exact. Superdrug like many FMCG businesses has a very complex system for buying goods. That system has a very detailed supplier guide attached to it. It assumes that formal purchase orders need to be generated in order for an order to be placed and the question here was given that there was a supplier guide and a complex system, given that Athena knew of it had a contract nevertheless come into existence merely by exchange of emails between Athena's seller and Superdrug's buyer. This was a trial of a Summary Judgment Application so Athena was saying Superdrug's defences are so poor that there is no question of them succeeding a trial and we should get Summary Judgment so really quite a high bar for Athena to cross but the court said yes it would give Summary Judgment, none of Athena's defences had a real chance of succeeding. Part of the problem was the supplier guide placed no express limit on the buyer's authority nor did it say that ratification of purported purchases by the buyer were required. Athena didn't argue that the buyer had actual authority if you remember back to agency lectures, they didn't argue he had no actual authority but they argued

that he was given ostensible authority by the fact that his signature block described him as a buyer and the fact that he was put into a position by Superdrug where he was negotiating terms. Superdrug had said the required system hadn't been followed but the court said that wasn't sufficient. It said there was no generally industry wide accepted practice on these things and that overriding the buyer's ostensible authority required more than Superdrug had actually done. There's a real dilemma here if you're an in-house lawyer at one of these businesses isn't there? Day to day running your business relies on buyers going out, buying things, doing deals, the last thing you really want is to require them to add to their signature block, I am not authorised to do anything but the reality as we say here is that it's very easy for somebody to give rise to a contract even if that's not what his employer had intended. If you have one of these systems it's now certainly not enough simply to have it in place and keep it up-to-date. You probably need to train your buyers regularly so that they avoid giving rise to a contract if that was not what they intended. I would query whether actually it was reasonable here for Athena to rely on the buyer's authority. The court's decision effectively means that even if Athena had known that to place individual call offs a purchase order would be required, it wasn't required to assume that that was the case for entering into a twelve month £1.3m contract which seems to me a little hard to buy.

I've got a couple of cases now on indemnities. I had to include this case partly just because of the name which is a bit of a scream but it is a reminder of an important point in relation to indemnities that I suspect we often forget when we're drafting them particularly when they're time limited so an indemnity that says that claims have to be made within a period, not uncommon as I understand it in share and business sales. Here the seller had to indemnify the purchaser against the amount of any tax payable to the extent the tax has not been discharged or paid by completion so we find ourselves in the Court of Appeal arguing over the meaning of the word payable. Well the court here said payable meant when there was an enforceable obligation to pay the relevant amount of tax. On the facts, because there was an appeal pending that position was only reached when the appeal to the tax court had been played through so payable meant payable against a final judgment. Now put that together with the idea that that indemnity might have been limited to say 12 months and you can both see that the indemnity could easily expire before we get a final judgment and if you want to be really Machiavellian even that the seller could ensure that the appeal took too long and the indemnity was timed out. So think about that issue if you're drafting indemnities and if you want the indemnity to kick in sooner you need to provide specifically for that. Of course, the counterparty won't necessarily just agree to that, they'll be concerned that you claim before a final judgment is entered, you get the cash then you win the appeal and now they have to provide for getting that cash back from you after the event so that might prove a difficult issue for both parties to negotiate looking forward. More fundamentally what is an indemnity and when is an indemnity not an indemnity and indeed does it matter? Well this case was considered by the court in AXA and Genworth back in December 2019. It's another Share Sale and Purchase Agreement, our corporate colleagues aren't coming out of this very well are they? The context here was liability for misselling so this was a business that had sold PPI, both parties knew that there were liabilities out there for misselling. In the event it turned out there were £265m worth of liabilities out there. Genworth had said it would pay 90% of the misselling losses. I guess the 90% was to ensure that AXA had some skin in the game and did it's best to mitigate those losses but the key question when AXA made a claim against Genworth was whether it had to take all reasonably available defences before recovering that amount from Genworth. Could it just pay up when it received a claim or did it have to fight it to an extent before it relied on the promise from Genworth? Genworth said this promise was an indemnity and accordingly it was to be implied that AXA would take all available defences. The court disagreed. The court said if the parties had intended this to be an indemnity they would have used that word. In fact they'd used that word in lots of other places in the SPA so it seemed very unlikely that without using the "I" word they'd intended to create an indemnity. Clearly there was no express obligation in the contract to take all defences so we're back into implied term territory here but the court said the issue here was one of interpretation not categorisation. What do I mean by that? Well the court said even if we accepted that this was an indemnity that doesn't mean that a whole load of baggage is to be implied around things like mitigation or taking defences. It was still a matter of asking what bargain the parties had done even if what they had done was to agree an indemnity. In any event on the facts this wasn't an indemnity, it

was a promise to pay on demand and the court added that given that the regulatory regime around misselling discouraged financial institutions from taking all available defences, it was inherently unlikely that that was what the parties had intended. To do what Genworth was arguing for would have got AXA into hot water with the regulators. So what are the lessons from this case? I know we shy away from using the "I" word sometimes because we know that it will get the attention of whoever's drafting on the other side but if we mean indemnity we probably have to use that word and even if we do use a key word like indemnity or undertaking or guarantee or warranty don't assume that that will bring a lot of terms along with it, it's probably safer to provide in the contract for the follow on consequences that you intend they're to be. I've nailed my colours to the mast on this slide haven't I by saying at the top "Good Faith rears its ugly head again!". In the past there was an outlying decision that suggested that good faith should be implied into English contracts and I wasted a lot of breath telling people why that was a bad idea, why this case was an outlier, the Court of Appeal decision refused to follow it. The decision in Yam Seng unfortunately for my arguments was given by Mr Justice Leggatt who, of course, is now sitting in the Supreme Court and junior judges are falling over themselves to agree with his decision in Yam Seng. Don't get me wrong, I have lots of sympathy with the claimants in the Bates case. This case was the group litigation arising out the problems, the infamous Post Office Horizon computer system. You might remember that a lot of sub-postmasters and sub-mistresses went to prison allegedly for fiddling the books and it turned out after the event not only that it was the computer system that was at fault but that the Post Office had at certain key points known that that was the case but nevertheless allowed things to take their course. So the court in the Bates case is faced with another situation like Yam Seng. Significant disparity in the bargaining positions and the parties, of course, Mr Bates and his fellow claimants hadn't negotiated the contract, hadn't negotiated and made a load of promises in the part of the Post Office so somewhat counter to the flow in terms of the BNP Paribas case we find the court deciding that good faith should be implied in this case to give a remedy to Mr Bates and his co-litigants. The court followed Yam Seng in saying that that wasn't the case in all contracts but it should apply in what it called relational contracts. The idea here then is contract that involved the parties co-operating over a period of time. If it's an SPA the parties can hate each other's guts and walk away the day after completion and by and large not have to co-operate again but if we're looking at a JV or an agent or distribution agreement or a franchise agreement, for example, the parties need to co-operate so the court, Mr Justice Fraser, tried to define what a relational contract was, long term collaborative parties' integrity infidelity. Do they ever admit to anything else? No contrary contract terms, yes that well known term that says we have no obligation to act towards you in good faith. It's not surprising that we don't see contrary contract terms is it really? Less controversially high degree of communication, co-operation or mutual trust and loyalty, significant commitment or investment so that's what a relational contract is and now we have quite a bit of authority that either tells us that in those circumstances good faith will be implied or had the parties as in the New Balance case accepting without even arguing the point that good faith was to be implied.

One of my historic arguments against implying good faith was that nobody could tell you what it meant. If we implied a good faith term how would the parties know exactly what they were and were not allowed to do in consequence of it? Well the court in the New Balance case has tried to give us a definition. The test of good faith is whether reasonable and honest people would regard the challenged conduct as commercially unacceptable? Well I'll leave you to pick the bones out of that one but I'm aware of lots of things that reasonable and honest people do that might not be legally acceptable even if might be commercially acceptable. Maybe not disclosing all your income on an income tax return would be a good example of that but what's clearly happening now in the way that maybe 20 years ago when parties couldn't think of any other arguments to put in their pleadings they claimed a breach of competition law. The issue du jour now is good faith and it's finding its way into all sorts of cases and the Cathay Pacific case there is another example. There the court said no, the contract wasn't relational. To suggest otherwise would be linguistic manipulation. I'm sure lawyers never get involved in that. So that was a case where good faith was not successfully claimed but it's coming out of the woodwork in terms of claims we're seeing and it's certainly something you need to bear in mind as an issue if you're drafting a JV or a long term co-operation agreement, franchises, distributions etc.

A couple of final things to finish off, the Neocleus case and other land case, of course, the contract for the sale of land needs to be in signed writing so the question here was whether an exchange of emails between solicitors with just an email signature amounted to signed writing. The court said yes it did and in particular the mistake that the friendly solicitor concerned made was to summarise the terms in an email, then include the words "many thanks". How foolish to say many thanks and then put his email signature. No question of a wet ink signature or any facsimile of a signature just the terms "many thanks" and his email signature, that was enough to amount to a signed contract for the purpose of the Law Reform Miscellaneous Provisions Act 89. Well, why am I telling you this apart from sympathising with the solicitor concerned? Well, we talk very early on about the Rock Advertising case and so called non-clauses, do you remember? Clauses that might say no modification to this contract is valid unless in writing and signed by or on behalf of both parties. Well hold on a minute, if an email with an email signature block is enough to amount to a signature then maybe the court's decision in non-clauses isn't as earth shattering as we might have thought because a mere exchange of emails with email signatures will be enough to amount to a signed agreement as to the amendment of the terms assuming, of course, that both parties have exchanged emails so the non-clauses issue might not be as significant as we first thought.

Just some other cases in brief here and I won't go through all of these. Peninsula and Dunnes Stores, another Supreme Court case from last August, overriding you'll all the remember the test in Esso and Harper's Garage about whether restrictive covenants are enforceable. This case signals both a mutest and a more liberal approach to these issues than the courts have adopted previously. Adopting what's been called a trading society test in place of the prior pre-existing freedom test so it may be time to blow the dust off those covenants in your contract, it may be that your client can take a higher line now on restrictive covenants than might have been prudent previously. Computer Associates and Software incubator this might be the last case that was ever referred from our Supreme Court to the court in Luxembourg. The question there is whether for the purpose of the commercial agent's regs which are still in force despite Brexit, software amounts to goods and we had the Advocate General's opinion recently giving the perhaps surprising view, contrary to the Court of Appeal's decision, that software should indeed be treated as goods even if it's not on a floppy disk or the equivalent.

I mentioned the Canary Wharf case earlier on in terms of frustration and force majeure and I'll leave you to read the other cases on that slide.

Very briefly and finally we've had a case on The Contracts Rights of Third Parties Act. It seems you can have third party rights even if you weren't previously aware of the contract granted them to you. We still don't know whether a witness presence by Skype is sufficient for execution and attestation of a document. A very modern problem but not yet among Mensa and finally if you're dealing with no set-off provisions you'll find the court's extensive summary of the law on those issues in Venson and Morrison's, yes that's the supermarket, a very interesting place to go.

Well that's all I wanted to say. We've got a few minutes left so hopefully Katie won't be too annoyed with me. Katie, are we taking questions now or waiting until the end?

Katie Kinloch

I do have a couple of questions for you. Thinking back to the early part of the session, talking about Covid and force majeure and whether you're seeing that people are adding in references to pandemic in definitions. Are you also seeing customers under agreements drafting obligations on suppliers positively to be ready and prepared to deal with Covid and similar pandemics?

Jonathan Davey

That's interesting isn't it, positive obligations rather than either negative ones or release of obligations if there's a pandemic issue. I haven't actually seen that much, if at all to be honest Katie but it's a good point and I think, I am actually working on one thing at the moment where we are actually saying to an auditor who's going into premises to do an audit, it's up to you to ensure everybody's got the adequate PPE. You know none of these things are going to be a problem. You have to set up access, you have

to deal with things safely because, of course, what we're doing is allocating risk and I guess what we're saying in that case and what this question goes to is how do we ensure that we've allocated the risk to the other party where that's appropriate so it's a good idea. I'm going to take that one. I asked at the start whether I'd give people something they could take away and use now I've got something I'm going to take away and use.

Katie Kinloch

That's good to hear. Another one is the M&S case and implied terms. Is the consequence of this that lawyers are just going to draft even longer contracts than before for fear of missing out something that's important?

Jonathan Davey

Possibly, I mean the Lease in that case was drafted by Magic Circle firms on both sides. I don't think there was any question it was skimpy on detail or didn't contain all the usual provisions. The issue at hand in that case was that M&S had break rights in the lease but rent was paid quarterly in advance and, of course, the break clauses, the break dates didn't fall on quarter days so M&S knew that it would want to break at the next break date, it duly paid it's rent on the quarter day, it had to because one of the conditions of exercising the break clause was that it should be up-to-date with all its obligations so it paid the rent on the quarter day. Let's say a month later it served notice to terminate and it then very nicely asked BNP Paribas for two months' rent back and BNP Paribas said no you're not having it, there's nothing in the Agreement that provides for that and that was we ended up in court and M&S said surely it must be implied that if we have a right to break and we've paid rent in advance that should mean we get the money back but as we saw the court refused to imply that term and indeed you know if you were acting for BNP Paribas you'd say well, no we're not giving that money back, we're going to have a void in that building for more than a couple of months while we find a new tenant that two months' money won't even compensate us for our losses let alone result in a windfall so you can certainly take both sides of the argument in that case in any event. Certainly I don't think, I'm not sure anybody drafts a contract assuming that if they don't cover something the court will imply a term but if anybody does do that and has done that hitherto it's not a safe assumption going forward.

Katie Kinloch

Okay, great, thank you. There's a question about one of the cases you just touched on at the end there, the Software Incubator case, could you just elaborate just for a moment or two about the significance of software being considered goods or not.

Jonathan Davey

Yes, sorry I sort of skimped that, I had my eye on the clock a little bit too much. So the commercial agent's regulations give extensive rights to agents including a right to a big pay off on termination even if the agent dies or the contract comes to a natural end. The catch is they only apply to agents for the sale of goods not services so if software is services or if software is something other than goods the agent has no rights. If software is goods then the agent has rights. Now the Advocate General has come at the issue in deciding that software is goods not I suspect because he thinks that really is the case but because these rules were decided and expressly stated to be about giving protection to agents so in the same way as we might employ a broad definition, say a worker, because directives that refer to workers are intended to give workers rights the Advocate General is saying we should give these phrases their broadest possible meaning but it does create all sorts of problems. The green deal case I mentioned on the slide where there was £1m pay out was to do with energy, well I'm pretty sure gas and water are goods but what about electricity? What about heat? What about a wi-fi signal? Are those goods? Where does that road end and on the back of that are potentially millions of pounds of claims for people who'd been selling those things as agent for the supplier?

Katie Kinloch

As you say, one to watch that one. I think we've got time for just one more quick question and this is someone saying that their legal team is generally trying to work more efficiently and get less involved in drafting the commercial bits of agreements so that on that basis should they perhaps tell their business colleagues not to write examples in contracts given the risk of them contradicting some of the carefully negotiated terms at the front end of the contract?

Jonathan Davey

Well there's several things to pick up in answering that. First of all, if the assumption is that the commercial people draft the schedules and we draft the front end I've always thought that's a very dangerous approach to take. I know the schedules can be desperately long and very dull but I really don't think there's any way around for a conscientious commercial lawyer other than to go through the schedules. Secondly, and I deal with this in the E-alert that I mentioned on examples, every time I've used them I've found them done something to the negotiation before signing and this is the thing we can forget if we only look at the case law. Every time I've had an example in a contract somebody's piped up and said hold on that's not how it's meant to work at all, it's actually helped the parties right their deal down more clearly and I think that that's the bit of the iceberg we don't see if you use examples, it really does help people focus. They'll skim over the words you've written and the formula you've, excuse me, put together but if there's a worked example there then they'll go through that and if it doesn't work the way they intended they'll say something about it. Somebody once said good fences make good neighbours and I think good contractual negotiations lead to good relationships after the event and perhaps when we see the tip of the iceberg and the dispute we don't see the whole point.

Katie Kinloch

They sound like excellent wise words to end that section of this morning's webinar. Thank you very much Jonathan and now on to Will to talk to us about smart contracts. Thank you Will.

Will James

It's interesting following up a talk from Jonathan to actually have a section called smart contracts because I think picking up on some of the themes that Jonathan raised in his talk, there are a number of situations which we all find ourselves in where contracts are effectively put to one side and then the commercial counterparties in relation to the deal such as with Athena, start by exchanging emails and using systems to effectively to create orders and to statements of work which they are open to question in terms of whether they have actually created a contract or not and this is where I think the real life applications of smart contracts start to rear their head as opposed to the situation where they are mostly a theme which is in crypto currency arrangements and occasionally in FX so there's a bit of light relief at the end of all that law and I've been asked to talk to you a little bit today about smart contracting which is a little bit of anomaly given that the smart interface is not doing anything. Katie … right I'll probably go backwards and forwards again now. What I'm going to look at today is what is a smart contract? Exactly how smart are they? I'm going to look at why they are relevant and then some thoughts on legal issues on smart contracts and there have been a couple of cases recently which are relevant and in relation to how smart contracts work and how they courts are looking at smart contracts and for those of you who are very old I'm going to actually cite a very, very old case which some of you may even remember, well I remember, from my days at law school and I'm going to pass a few comments on where they are likely to impact on your day to day life and it won't be in a crypto currency environment.

So for those of you who aren't heavily invested in Bitcoin or trading on E-Fit futures you may not be aware of what a smart contract is or you may have heard of them and were wondering exactly how smart they are.

A smart contract is effectively a generic term which has been formulated to infer a situation where a contract arises by reference to a series of hard coded computer instructions that execute and take certain actions automatically when various conditions are satisfied now to try and give you a sort of a real world example of that, if any of you attended … there was a previous talk I gave on this and I talked about fridges but I thought this time I'd use something which we've all used a lot probably during

lockdown is Moon Pig. I don't know if anybody of you have used Moon Pig but when you use the system it defectively recognises that you're sending somebody a birthday card and asks you if you'd like a reminder on the next birthday or prior to the next birthday even to send a card and it doesn't stretch the imagination that you would enter into a smart contract with Moon Pig to effectively say three or four days before my partner's next birthday could you create a nice design, put a nice message in the card, take a payment from my stored payment credentials and ensure that the card is posted and then on the day of your birthday when you are probably being accused by your partner of having forgotten their birthday, the postman knocks and there you are you've got your card with a thoughtful message, a thoughtful design and with their name on it. That is effectively a smart contract. The principal condition there is the date, once the date is effectively triggered the instructions activate and effectively the card is created, a contract is created for the sending of a card, your payment is taken automatically from your stored payment credentials, your credit card or even your bank account and that's how you make sure that the card is delivered is to your partner but those of you who would probably point out pretty quickly that's not really terribly smart is it? It's effectively just based on a particular logic date being satisfied if date equals and that will presumably be the date of a birthday then that would be effectively the sole condition for that arrangement. A true smart contract are the ones that you tend to see which have come up for consideration in the crypto currency environment are effectively those that operate on the basis of extremely complex algorithms with complex interactions and with various input from various different sources but then control the execution taking, for example, prices of various forms of crypto currency and then making complex trade on the back of that price position but there's also an issue there in terms of exactly how smart are those arrangements, is a deterministic algorithm, does it actually exhibit actual intelligence, does it do anything other than follow a series of logic instruction which whilst extremely complicated are just effectively a programmed series of gates with conditions, one of decision trees to determine what happens and effectively when is the contract made? When one of those deterministic algorithms effectively does it's stuff. So why then might they be relevant to you? What is the purpose of a smart contract? Well a smart contract as we've seen takes a series of input and then effectively automates a series of output and the principal sort of benefit that is always to seen to smart contracts is that they reduce friction in the execution and delivery of contracts because what happens is when a set of criteria are met they effectively start to operate and start to implement automatically so, for example, if you had a requirement for FX and you wanted to ensure that you had sufficient foreign exchange in your account to make a particular purchase on a particular day what you would do is you would effectively programme into the smart contract but it would buy the currency at the best rate at a given time or during the course of a particular day and they you would be certain of having the relevant amount of currency in your account to effectively complete the trade or complete the acquisition and for retailers or for supermarkets or anybody buying goods and services frequently across the borders, having the relevant amount of FX at a good rate in their account at the relevant time is quite important and again avoiding having to make a phone call to use a broker, for that to happen automatically again is extremely useful. So the processes and intermediation within a smart contract can be automated so that money comes out of one account, is effectively used to purchase FX from another account and then the FX is then automatically credited to your account. They avoid the need for working with multiple parties and agents because effectively all the processes are automated and integrated with the systems of, for example, a supplier of produce. From a funds transfer perspective what they effectively enable is the immediate and seamless transfer of funds. Again for those you involved in foreign currency or settling cross border you'll know that it can take sort of two to three days for settlement and curing positions to be effectively dealt with. Equally it deals immediately with the execution of particular deliverables so the extent you need a purchase order or you need to know where business services are or that they have been loaded on board at a particular port or on a particular lorry again the smart contract effectively can take the input from a system and effectively confirm that delivery having taken place or risk having passed. The most sort of frequent applications at the moment are in FX trading and in crypto but as we move forward future applications could include, you know, a just in time delivery message and logistics and I'll come on to a few of those in a second.

So what can possibly go wrong? I very much enjoyed Jonathan's comment, if you get the drafting wrong. In a smart contract it's not so much if you get the drafting wrong but if you get the coding wrong and just to give you an idea of some of the issues that might arise, I was involved two or three years ago in an early smart contract which I was very excited about because effectively what it was going to deal with is, it was a potential product for a credit card and it was going to deal with effectively automated payments, award of loyalty and also various other incentives that effectively happen automatically when the customer spent money on their card. I duly started to write … I was told that I had to write effectively what the conditions were and everything else and duly started writing a whole series of conditions and what would then happen and by the time I got to about six or seven I thought it would be useful to call the coder and have a chat to them about how this was going to be hard coded into the smart contract, who immediately told me that over about seven or eight different permutations the actual potential, sorry six or seven conditions the permutations for those conditions started to get into how many stars there were in the universe and I'm sure you've probably seen that in some of your children's maths classes and that's half the problem because computers follow instructions to the letter and are not in that context usually smart or intelligent. They'd pretty much do what they're told, they do not effectively exercise freewill much as we might want them to or indeed not might want them to but they are not smart or intelligent and therefore unintended consequences can flow from seemingly innocuous input. One of the most famous examples of this was the DAO which was effectively an interesting positon where a smart contract was formed for the purposes of Venture Capital investing and what was seen was that Venture Capital investing was extremely profitable but that it was effectively controlled by a small minority of people who effectively dictated where the minorities money would effectively be placed so it effectively had a consensus model for investing in various projects. In order to protect the position between them, the majority and the minority, what they effectively said was that anybody could effectively withdraw their money at any time so there was effectively a right to exit and the way that right to exit was effectively initiated to the smart contract was that you could sell your interest in the fund at any given point in time and the funds would then effectively be sold by the smart contract and settled into your account. What they had failed to realise was and one clever individual did realise and not necessarily a devious individual but he realised or she realised that the contract didn't have any timings for settlement of the particular amounts and effectively the reconciliation of the settlement was done later in the day and you could effectively have a recursive transaction going on and on and on with no idea what the actual balance position was and as a result was able to extract a vast sum of Ether from the actual fund. Now that then gave rise to an enormous amount of stress and argument in the community because effectively the contract did what it was supposed to do and what it was enabled to do and then there was argument then around effectively the extent to which that arrangement was effectively part of the code and therefore part of the contract that everybody accepted when they entered into ... agreed to put their money into this fund.

Also in a recent Singaporean case at which a coin … an algorithm which is an extremely complex deterministic algorithm started buying crypto at any price to settle a settlement obligation as a result of which somebody was able to buy the Ether and Bitcoin at a rate that was significantly lower than the market and obviously at that point because effectively what happened was the market being made was only being made at the relevant time by one trader and a longstop price was effectively inserted by the smart contract and the chaos that duly ensued and effectively there was a great discussion around there which is outside the scope of this talk around mistake and how mistake would be implied in relation to those kind of contracts but the more problems and variables … the more variables you have the more problems you tend to get with smart contracts and so they come less smart, the more stuff that you programme into them but in the context of simple arrangements where you've got a set of simple instructions that you may be spending an awful long time dealing with generally then it effectively provides an interesting method of ensuring that a contract is properly formed and also that it is then effectively binding on the parties and the case that funnily enough is regularly mentioned in smart contract cases is Shoe Lane Parking which, for those of you who recall, is one of Lord Denning's old cases, he probably wasn't even Lord Denning at the time, where effectively the court held that by the insertion of a coin into a machine the contract could be formed by the machine just by the action of

putting the coin into the machine and that has been carried through to a number of the cases that have arisen in relation to crypto currency and the basis on which a contract can arise notwithstanding the fact that the contract effectively comes into being by the operation of a set of coded instructions and the question then arises were the parties aware that such a contract had come into effect and the answer to that is broadly speaking yes and my smart contract.

So in terms of where you might start to see these, oh sorry Katie I'm just going to talk actually just for a few seconds sort of in terms of the … where some of these, where we are starting to see some of these contracts effectively start to arise. I think the … obviously I think there have been smart applications particularly in relation to logistics, particularly tracking and tracing goods as they progress across the globe, the release of products at various ports, the release of payments to particular products at various ports or indeed when they are in fact delivered. You then to see that entertainment is very interested in effectively creating smart contracts for the use of IP rights so that effectively payments for royalties and so on can be automated. I've already mentioned briefly the internet of things. We're increasingly seeing people using the internet of things to regulate their lives. Smart meters could be made even smarter by automating payments or by budgeting payments and again I think you'll already see in the insurance industry smart contracts or indeed contracts that come into being pretty much automatically, once an offer has been made and a broker has accepted that offer it's effectively already happening. So I think, and the issues that I think are going to come up for some of you as you move forward is that as increasing numbers of systems are used and we've heard in relation to the Athena case, for example, how systems are being used to create contractual obligations maybe just by the use of email but equally by the use of ordering systems, the way in which those ordering systems operate and again the potential for those ordering systems to be subverted. It may become something which you will need to look at, not necessarily in the context of creating a smart contract but in the context of where the contract is actually made and how it is made and whether it comes into being automatically. I'm happy to take any questions on this as we move forward, thank you.

Katie Kinloch

Thank you very much Will. We do have some questions. Starting off with a very pity one really here which is simply where does lawyer end and software coder begin?

Will James

Yeah, that's a really good question. I don't think although I think my demise has been predicted many times in the past by various different commentators, I think effectively I think lawyers are going to become, and I think certainly in relation to simple contracts I think increasingly lawyers maybe have to become coded, not least to understand how coding works particularly in the context of how logic works in computer contracting and, as I say, and as you split the decision what the potential for chaos is.

Katie Kinloch

Okay. Sort of on a similar theme really thinking about liability issues in the future is it going to be better really for businesses to employ their own coders rather than rely on third party companies because to continue the question I mean that's the more third parties, the more suppliers you had involved these are yet more variables where things can go wrong.

Will James

Yeah and I think that's also extremely pertinent. I think increasingly we're seeing a number of systems being used in a number of different ways to deal with a number of different supply chain, delivery, customer interactions and again the control over those I think is going to become increasingly important particularly the control of data flows so yes I think increasingly businesses will start to use coded in innovative ways to ensure, for example, that you know where you're making contracts by emails that those are properly stored, that a process is gone through when you are making an email order or dealing with a purchase order and to ensure that effectively the data is still correct and that you have access to it for audit purposes so yes absolutely.

Katie Kinloch

Okay and one final one, what does negotiate mean or what will it mean in the context of smart contracts do you think?

Will James

Funnily enough I was … as Jonathan's last remark about you know it's good to negotiate and how can you negotiate with Robocop, sorry to be slightly trivial but I think it's, you have five seconds to comply. I think it's … I don't think it's going to get to the point where we are negotiating … big procurement contracts are effectively being negotiated by computers or are computer contracts. I think what you'll see is big procurement contracts will have smart elements to it which deal with particular components of the arrangement and effectively are derived from the actual drafting so I think the negotiation of a particular process or a particular way something is done will still be done by the lawyers in the commercial focus and I think what will then be handed over will effectively be a DIA, one of Jonathan's examples and they will be saying hard code this example so I think in terms of the crossover between you know in terms of drafting examples and then slipping that example into a piece of hard code. You know how many times have we said run that through the spreadsheet, I mean again for those of you who've done transactions where you've been hedging and you've been fixing a hedge you'll normally see somebody putting a series of numbers into a spreadsheet and something gets spat out at the other end. That's effectively a smart arrangement or a set of algorithms which effectively determine what the output is so I think what you'll see is components of contracts you know being effectively hard coded and being effectively able to be implemented and delivered automatically.

Katie Kinloch

So I suppose logically from that we'll eventually move away from the idea of the contract being 100 pages of A4 that we've worked on in word that can be printed out as a complete statement of the deal.

Will James

Yeah and I think what'll see is I think you'll probably move to a model where you have a framework with a series of arrangements underneath it which essentially you say this is the way these things happen. I think there's going to be probably a good deal more testing going on to make sure they don't go wrong but yeah I can see that and I think in certain areas particularly when you know you're talking about just in time purchasing when effectively you've got to effectively have stuff in place by a given time. If you're thinking about, in my area we do a lot of deals where effectively the receipt of a payment is critical from a timing perspective so that then the producer can then act on that to buy future products and if they're in a cycle often that will be in a manner of minutes when they need to fix a hedge or a price for the following day so that then suppliers and everybody else and distributors can be told what the price is and I think if those things are automated then it just makes the whole system more efficient. Well that's the dream.

Katie Kinloch

We do actually have one final question which I think we can squeeze in which is to my mind it hurls back a bit to your Moon Pig example which is do you think that smart contracting could be used in the retail space for end users, for example, where goods are on offer and they automatically go into your basket and are automatically shipped to you.

Will James

I think absolutely, I mean, you know I am currently waiting for delivery of a new pizza oven as my gift to myself for my staycation and I've chosen a pizza oven which is only being released in small quantities, I'm not even going to tell you because I'm terrified you'll all sign up for it. I would love if I had effectively, if I could basically have written a smart contract that says as soon as this comes up for offer, as soon as the next bit of stock is released just buy one for me, don't care, just get it and I think you would see on eBay there are, for example, there are sniping programmes that allow you to set a price for a

particular thing that you want and it will continue sniping the offers to do that. So I think yeah absolutely I would love a couple of sort of a bit of smart code in my Amazon/eBay/good product turn gadgets arsenal to be able to get stuff that I want. Look forward to that.

Katie Kinloch

Me too, me too Will. So I think that's all we've got time for. Thank you very much Jonathan and Will for covering a full gamut of contract issues that we see at the moment. As I mentioned at the start we have recorded today's session and we'll send it to you all in due course but it should be available in the next few days on our website. If you want to click on the Insights and New section there's a section called On Demand Webinars, you'll be able to find it there. There's also still time to sign up for our three other sessions in this GC Update series of webinars so next week 9th March we're focusing on data protection and privacy, on the 16th March our employment team will be looking at the latest developments in that area and finally on the 23rd March our litigation team particularly the health and safety side of things will be focusing on the latest issues on health and safety law and insurance particularly with a nod to Covid there. You can sign up to all of these again on our website wwwaddleshawgoddard.com in the Insights and New section and that'll take you to an event registration page or you can email emma.whitcombe@addleshawgoddard.com. So, thank you very much everybody for attending. Have an excellent rest of the day and rest of the week and we'll see you next time. Thank you very much.