SLAUGHTER AND MAY

Contract law update

October 2026

Welcome to the Slaughter and May Contract Law Update, providing insights into key developments in contract law for corporate and commercial practice.

Contents

01. Information in the public domain

Expressions with an accepted meaning in law will generally be interpreted in line with their established meaning. Absent drafting to the contrary, references in NDAs to information in the "public domain" will likely take their meaning from the law of confidentiality.

Click here to read more

02. Lack of consideration

Something of value must be given in exchange for a promise to create a contract. Courts are reluctant to find agreements unenforceable for lack of consideration, but bare forbearance will not suffice, and a bare promise cannot have contractual force merely because of a jurisdiction clause.

Click here to read more

03. Scope of indemnity

The operation of any indemnity is a matter of construction. The starting point is that agreements generally govern what happens after they are agreed, not before. Clear words are needed if parties intend that an indemnity applies retrospectively to past conduct.

Click here to read more

04. Causation, remoteness and indemnities

Indemnities are an important tool for allocating risk, but many of the advantages of an indemnity can only be achieved by clear drafting. The indemnity's scope, triggers and consequences are ultimately a matter of construction, and the application of principles of causation, remoteness and mitigation depends on the drafting.

Click here to read more

05. Implied good faith duties

There is no general duty of good faith in English contract law, but duties may be express or implied. Despite an "avalanche" of claims founded on so-called relational contracts, courts remain reluctant to imply duties of good faith. Identifying a contract as relational is just one factor and does not displace the usual tests for implication in fact.

Click here to read more

06. Legal black holes

Transferred loss is a limited exception to the general rule that a party cannot recover another's loss. It exists to avoid a "legal black hole", where the person entitled to recover differs from the person who suffered loss, and applies only where the parties contemplated that the contract would benefit a third party.

Click here to read more

Information in the public domain

Interpreting phrases with well-established meanings

> Expressions with an accepted meaning in law will generally be interpreted in line with their established meaning. Absent drafting to the contrary, references in NDAs to information in the "public domain" will likely take their meaning from the law of confidentiality.

BACKGROUND

IX, Altana and Brevent established a joint venture to set up a fund to invest in Venezuelan distressed debt. The parties entered into a JV agreement, together with a non-disclosure and non-circumvention agreement (NDA) based on a professionally drafted template or precedent.

The JV came to an end without launching a fund. Altana later set up its own fund focussed on distressed Venezuelan debt. IX claimed that, in setting up the fund, Altana and Brevent had misused its confidential information and trade secrets.

The NDA provided protection for broad categories of confidential information, subject to certain exceptions. In particular, the confidentiality undertakings did not apply to information which "at the time of supply is in the public domain" or "subsequently comes into the public domain other than as a breach of the undertakings contained in" the NDA. Altana and Brevent argued that information in the public domain extended to any information which had been disclosed without being subject to a duty of confidentiality, so the exception would apply where (just) one other person was free in law and equity to use that information. The Court of Appeal disagreed.

THE MEANING OF "PUBLIC DOMAIN"

Where parties to a professionally drafted contract use an expression with an accepted meaning in law, that expression will likely be interpreted to bear that meaning unless the wording of the contract indicates that the parties intended otherwise.

The equitable doctrine of breach of confidence may prevent the misuse of confidential information. In that context, "public domain" has a well-established meaning: information is in the public domain where it is so generally accessible that it cannot be regarded as confidential.

In *IlliquidX,* the Court of Appeal held that references to "public domain" must be construed in accordance with the expression's accepted meaning in law. There was nothing in the wording of the NDA or the wider factual matrix to suggest that the parties intended "public domain" to bear any other meaning. There was no necessary correlation between the breadth of the definition of "confidential information" and the breadth of the exceptions to the confidentiality undertakings, and the court's interpretation did not lead to undue uncertainty or deprive related provisions of utility.

The Court of Appeal also rejected arguments that the relevant information came to Altana and Brevent independently and that the circulation of marketing materials to selected potential investors meant details were in the public domain, and dismissed the appeal.

REFLECTIONS

IlliquidX demonstrates that, absent drafting to the contrary, references to "public domain" in NDAs will generally be interpreted in line with the expression's established meaning in the law of confidentiality. More generally, it serves as a reminder that clear drafting should be used where parties adopt a phrase with a well-established meaning in law (such as "negligence" or "actual knowledge") but do not intend that phrase to have its prima facie legal meaning.

KEY TAKEAWAYS:

- Where parties use an expression with an accepted meaning in law, it will generally be interpreted to bear that meaning
- Absent drafting to the contrary, references in NDAs to "public domain" will likely be construed in line with the expression's meaning in the law of confidence
- Where a phrase with an established meaning is intended to have a different meaning, express drafting should be used

READ THE FULL CASE:

IlliquidX Limited v Altana Wealth & Ors [2026] EWCA Civ 874 (10 July 2026)

Lack of consideration

Bare forbearance or a jurisdiction clause is not consideration

> Something of value must be given in exchange for a promise to create a contract. Courts are reluctant to find agreements unenforceable for lack of consideration, but bare forbearance will not suffice, and a bare promise cannot have contractual force merely because of a jurisdiction clause.

BACKGROUND

Although consideration is a mandatory requirement for the formation of binding contracts, cases relating to consideration are uncommon in practice. The decision in *Denning v Arcem* is a rare example of a case where the doctrine of consideration was central.

The parties entered into a loan agreement. Repayment was due in 2020. In 2021, the parties entered into a security letter containing an express jurisdiction clause, under which the borrower agreed to provide security for the loan. The lender issued a claim in respect of the loan agreement, relying on the jurisdiction clause in the security letter to serve out of the jurisdiction without permission under the Civil Procedure Rules.

To serve out without permission, the lender had to show a good arguable case that the parties had entered into a contract providing for English jurisdiction. The question was whether the security letter containing the jurisdiction clause was binding.

FORBEARANCE AND CONSIDERATION

The High Court held that the lender did not have a good arguable case that the security letter was supported by consideration, so it could not rely on the jurisdiction clause. The security letter imposed obligations on the borrower relating to the grant of security; however, it imposed no obligation on the lender.

Consideration must be provided in return for a promise. Although the lender had not sued the borrower for payment under the loan, there was no evidence, beyond the bare sequence of events, that it had forborne on the strength of the borrower's promise to give security.

The High Court also held that the jurisdiction clause contained in the security letter could not itself amount to consideration. A bare promise that is otherwise unenforceable cannot become a binding contract merely because of a dispute resolution clause. (The lender was nonetheless granted permission to serve out, as the loan agreement was governed by English law.)

REFLECTIONS

Courts may look hard to discover consideration to avoid finding an agreement unenforceable. *Denning* nonetheless demonstrates the risk that courts may not find consideration where there is no clear exchange.

In practice, parties should ensure that the contract clearly evidences consideration in return for any promises. In some cases, where there is a risk as to the presence of consideration, it may be prudent to provide nominal consideration or execute an agreement as a deed.

KEY TAKEAWAYS:

- Bare forbearance is not good consideration
- A dispute resolution clause alone cannot render a gratuitous promise enforceable
- Ensure that consideration is clearly evidenced, and consider whether to provide nominal consideration or execute a deed

READ THE FULL CASE:

Denning v Arcem Resources Limited & Anor [2026] EWHC 2426 (Ch) (21 September 2026)

Scope of indemnity

Clear words needed for retrospective indemnities

> The operation of any indemnity is a matter of construction. The starting point is that agreements generally govern what happens after they are agreed, not before. Clear words are needed if parties intend that an indemnity applies retrospectively to past conduct.

BACKGROUND

Slaughter and May acted for Santander on its successful appeal in *AXA v Santander*. The case concerned payment protection insurance (PPI) policies mis-sold by Santander's predecessor (GECB) and underwritten by AXA's predecessor companies (FICL and FACL). AXA later acquired the business of FICL/FACL's corporate group, inheriting their liabilities relating to PPI.

For many years, an agency arrangement existed between the parties without any written agreement or indemnity. The parties later entered into a formal agency agreement, under which Santander agreed for the first time to indemnify AXA against any liability which it may incur by reason of any act or omission by Santander (including negligence) while performing its duties under the agreement.

AXA brought an indemnity claim against Santander and was awarded £677m (including interest) by the High Court. The key question for the Court of Appeal was whether the High Court had misconstrued the indemnity to apply in respect of acts or omissions occurring before the agency agreement was entered into.

The Court of Appeal dismissed AXA's cross-appeal on contribution under the Civil Liability (Contribution) Act 1978. AXA's PPI redress payments under the FCA's Dispute Resolution: Complaints sourcebook discharged a regulatory obligation, not a liability to customers that could be established in an action.

PROSPECTIVE OR RETROSPECTIVE INDEMNITY

The High Court held that the indemnity applied without distinction to all policies sold by Santander's predecessor on behalf of FICL/FACL irrespective of the date of sale. In other words, the indemnity's scope extended to retrospective conduct preceding entry into the agency agreement.

The Court of Appeal disagreed. As a matter of construction, the indemnity did not apply to policies sold before the date of the agency agreement.

It noted that the default position is for agreements to govern what happens after (not before) they are agreed. If parties intend a backward-looking approach, clear words should be included to show that the parties intend to record the terms on which they will be treated as having acted, as well as the terms on which they will continue to act. There were no such words in the relevant agreement. On the contrary, the indemnity's reference to acts or omissions by Santander "while performing its duties under the agreement" made clear that the indemnity was prospective only. Further support for that conclusion was found by reading the indemnity clause as a whole, together with the wider agreement.

REFLECTIONS

It is open to commercial parties to allocate risk as they see fit and determine an indemnity's scope. *AXA v Santander* demonstrates that the operation of an indemnity is ultimately a matter of contractual construction, and a seemingly narrow issue of construction can lead to considerable debate. Where parties formalise a long-standing relationship and intend new protections to cover past conduct, they should say so expressly; a general intention of continuity will not suffice.

KEY TAKEAWAYS:

- The operation of an indemnity is a matter of contractual construction
- The default position is for agreements to govern what happens after they are agreed, not before
- Clear words are needed if parties intend a backward-looking approach

READ THE FULL CASE:

AXA France IARD SA & Anor v Santander Cards UK Limited & Anor [2026] EWCA Civ 1185 (15 September 2026)

Causation, remoteness and indemnities

Clear drafting determines the reach of an indemnity

> Indemnities are an important tool for allocating risk, but many of the advantages of an indemnity can only be achieved by clear drafting. The indemnity's scope, triggers and consequences are ultimately a matter of construction, and the application of principles of causation, remoteness and mitigation depends on the drafting.

BACKGROUND

FW Aviation v VietJet was the third trial in a wider dispute relating to aircraft financing and leasing. Aircraft were leased to VietJet under a Japanese Operating Lease with Call Option ("JOLCO"). Under the JOLCO financing arrangement, VietJet had an option to purchase the aircraft but was subject to broad indemnities and significant early termination payments. During the pandemic, VietJet defaulted on rental payments. The lenders sold the loans, which were later assigned to FWA.

In previous proceedings, the High Court held that VietJet was required to pay termination sums by way of liquidated damages and return the aircraft. In these proceedings, FWA sought to recover (among other things) under indemnities for its costs of enforcement and for lost rental income for the period in which it was unable to lease the aircraft. The High Court upheld the lost rent claim for two of the aircraft for the period after redelivery but held that an indemnity for returning the aircraft to the required condition covered only costs actually incurred (or, alternatively, the diminution in value).

SCOPE

It is open to the parties to determine the scope of an indemnity. In *VietJet*, the broadly worded indemnity applied to all and any losses of whatsoever kind and nature and regardless of when they arose. The scope was not, however, unlimited. For two of the aircraft, FWA could claim under the indemnity only as successor of a financing party, which meant it could bring claims in respect of loss suffered in that capacity but not loss suffered because it subsequently assumed ownership of the aircraft.

INTERACTION WITH OTHER CLAIMS

Where general provisions within a contract are inconsistent with specific provisions, the general typically gives way to the specific. But it does not follow that the same loss cannot be addressed by different provisions. In *VietJet,* the existence of other remedies (including return of the aircraft) did not itself prevent the application of the indemnity. The indemnity could not, however, apply where liquidated damages fixed what would be recoverable for particular losses.

THIRD-PARTY CLAIMS

VietJet contended that the indemnity applied to claims brought by third parties but not in respect of direct costs "voluntarily incurred" by FWA. The High Court emphasised that each contract must be construed by reference to its own language and in its own context. In *VietJet*, the express language of the clause made clear that the indemnity was not limited to third-party claims.

CAUSATION

The stringency of any causal or connective link depends on the drafting. The drafting in *VietJet* suggested wide coverage: the indemnity applied to losses "relating to, arising out of, or resulting from (whether directly or indirectly)" a list of matters. The High Court considered that, read in the context of the JOLCO arrangements, the drafting indicated that the causal link was not confined to a proximate or effective cause.

REMOTENESS AND MITIGATION

Whether an indemnity is limited by principles of remoteness and mitigation is a matter of construction. It was common ground in *VietJet* that the default indemnity (triggered by breach) was a "damages indemnity" subject to principles of remoteness and mitigation. The High Court held that the general indemnity was, by contrast, a "true indemnity" which applied irrespective of any breach of contract and was not subject to a remoteness limitation. The distinction between categories of indemnity is difficult, but what ultimately matters is the correct construction of the contractual provision in question.

REFLECTIONS

VietJet tackles a number of difficult questions relating to indemnities. It illustrates that the scope, triggers and consequences depend on the drafting. Indemnities are an important tool for allocating risk, but many of the advantages of an indemnity can only be achieved by clear drafting.

When negotiating indemnities, ensure that the indemnity clearly identifies the losses it is intended to address, and focus on the required causal link once an indemnity is triggered. Consider express drafting to address the role of remoteness and mitigation and the indemnity's interaction with other provisions (including limitations of liability, for example).

KEY TAKEAWAYS:

- Many of the advantages of an indemnity can only be achieved by clear drafting
- Different provisions may address the same loss: the existence of other remedies does not necessarily prevent an indemnity's application
- Focus on the required causal link and consider express drafting to address remoteness and mitigation

READ THE FULL CASE:

FW Aviation (Holdings) 1 Limited v VietJet Aviation Joint Stock Company [2026] EWHC 1996 (Comm) (31 July 2026)

Implied good faith duties

Recognition of a relational contract does not suffice for implication

There is no general duty of good faith in English contract law, but duties may be express or implied. Despite an "avalanche" of claims founded on so-called relational contracts, courts remain reluctant to imply duties of good faith. Identifying a contract as relational is just one factor and does not displace the usual tests for implication in fact.

BACKGROUND

Virgin Media provides fibre optic data networks. Virgin Media and Svella entered into framework agreements in respect of works to be done by Svella to expand networks. Each year, Virgin Media negotiated with its framework contractors to provisionally allocate anticipated work between them, which was then subject to formal proposals for installation work under the terms of each contractor's individual framework agreement.

Relations became strained and the parties entered into an exit and settlement agreement, under which Svella waived certain claims while Virgin Media agreed to award further work under an existing framework agreement. Svella alleged that Virgin Media breached the framework agreements and settlement agreement, arguing that (among other things) the agreements were relational contracts containing implied terms of good faith.

IMPLIED DUTIES OF GOOD FAITH

Courts have generally been reluctant to imply duties of good faith. In *Yam Seng* and other cases, however, duties of good faith have been implied into "relational contracts" based on the presumed intention of the parties. A relational contract may be a long-term contract, involving a high degree of communication, cooperation and predictable performance based on mutual trust and confidence, with expectations of loyalty.

In *Svella v Virgin Media*, the High Court emphasised that the critical question is not whether the contract is relational, but rather whether a term should be implied under the usual principles for implied terms. A term may be implied in fact to give effect to the parties' intention where it is so obvious that it goes without saying or where it is necessary to give business efficacy to the contract, but there will be no room to imply a term where the parties have already provided for the relevant matter in the contract.

Granting summary judgment for Virgin Media, the High Court held that the agreements were not relational. More fundamentally, there was no gap in the agreements to imply any term of good faith. The framework agreements were detailed commercial agreements which expressly provided for how the parties were to collaborate and cooperate, with an apparently unfettered right for Virgin Media to terminate and mutual termination rights for convenience. The High Court considered it inherently unlikely that duties of good faith should be implied into a carefully negotiated settlement agreement, and Svella failed to identify why any implied term was necessary or obvious.

REFLECTIONS

Svella v Virgin Media illustrates that whether the contract is relational is just one factor to consider. The key focus is on the test for implication in fact, and there will be no room for an implied good faith duty where the parties' obligations are clearly set out in express terms.

KEY TAKEAWAYS:

- Identifying a contract as relational is just one factor when considering implied duties of good faith
- A term may be implied in fact where it is so obvious it goes without saying or it is necessary for business efficacy
- Terms are less likely to be implied where commercial parties use clear express terms

READ THE FULL CASE:

Svella Connect Limited v Virgin Media Limited [2026] EWHC 2223 (TCC) (26 August 2026)

Legal black holes

Limits of the transferred loss principle

> Transferred loss is a limited exception to the general rule that a party cannot recover another's loss. It exists to avoid a "legal black hole", where the person entitled to recover differs from the person who suffered loss, and applies only where the parties contemplated that the contract would benefit a third party.

BACKGROUND

A tenant granted a licence to occupy premises to its subsidiary, which operated a restaurant. The tenant later brought an action against the landlord for failure to repair, seeking damages in respect of losses suffered by its subsidiary.

The general rule is that only a contract party can recover damages for breach of contract, and that party cannot recover losses suffered by another. A "legal black hole" may arise, for example, where losses are suffered by members of a corporate group which are not party to the relevant contract.

In some circumstances, the principle of transferred loss may apply to avoid that legal black hole. In *Forthwell*, the Supreme Court considered the scope of the principle in Scots law and provided helpful guidance on its limits in English and Scots law.

TRANSFERRED LOSS

It is well established in English and Scots law that, under the so-called "narrow ground", the principle of transferred loss allows an innocent party in a property contract to recover a third party's losses where the parties contemplated that the property would be transferred to the third party or the anticipated effect of breach would be to cause them loss, provided the third party has no direct remedy. A "broader ground" has also been mooted, allowing a person who contracts for works to be performed on property owned by another to recover that owner's loss.

The tenant in Forthwell accepted that it did not meet the requirements of either ground. Instead, it argued that a wider principle of transferred loss exists in Scots law, extending to cases where the contracting party has a material interest in the loss suffered by third parties (such as members of its corporate group). The Supreme Court rejected the tenant's arguments, holding that the proposed exception would be too wide and too indefinite and does not form part of English or Scots law. In doing so, the Supreme Court repeated its observation in *Swynson* that there is much to be said for the broader ground, but (again) declined to decide whether it forms part of English or Scots law.

The Supreme Court also emphasised that cases concerning legal black holes are rare and that third parties may acquire rights under statute. In England and Wales, under the Contracts (Rights of Third Parties) Act 1999, a third party who is expressly identified in the contract may enforce a term if the contract expressly provides that they may or if the term purports to confer a benefit on them (unless, on a proper construction of the contract, the parties did not intend the term to be enforceable by the third party).

TRANSFERRED LOSS

Forthwell is a reminder that the transferred loss principle is a limited exception to the general rule that a contracting party cannot recover another's loss. The scope and application of the principle remain unclear. For parties entering into contracts intended to benefit the wider corporate group, the simplest and most certain course of action to avoid a legal black hole is often to provide express third-party rights under the 1999 Act or direct contractual remedies (such as collateral warranties).

KEY TAKEAWAYS:

- The general rule is that only contract parties can recover damages, and parties cannot recover for losses suffered by others
- The transferred loss principle provides only a limited exception to avoid legal black holes
- The simplest and most certain course is often to provide express third-party rights

READ THE FULL CASE:

Forthwell Limited v Pontegadea UK Limited [2026] UKSC 33 (17 September 2026)

Key Contacts

If you would like to discuss any of the above in more detail, please speak to your usual Slaughter and May contact or a member of our commercial contracts team.

If you would like to receive the Contract Law Update on a quarterly basis, please email subscriptions@slaughterandmay.com.



Duncan Blaikie
Partner
+44 (0)20 7090 4275
duncan.blaikie@slaughterandmay.com



Oly Moir
Partner
+44 (0)20 7090 3307
oliver.moir@slaughterandmay.com



Simon Tysoe
Partner
+44 (0)20 7090 3490
simon.tysoe@slaughterandmay.com



Callum Borg
Knowledge Lawyer
+44 (0)20 7090 3352
callum.borg@slaughterandmay.com



© Slaughter and May
This material is for general information only and is not intended to provide legal advice.
For further information, please speak to your usual Slaughter and May contact.