FENWICK ELLIOTT

The construction & energy law specialists

Annual Review 2023/2024

A round-up of key developments in the construction, engineering and energy arena

Contents

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ANNUAL REVIEW

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Welcome to the 27th edition of our *Annual Review*. As always, our *Review* contains a round-up of some of the most important developments from our clients' points of view over the past 12 months including, from pages 50-63, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter *Dispatch* as well as the *Construction Industry Law Letter*.

The Building Safety Act 2022 ("BSA"), which is primarily concerned with the safety of buildings and those who live in them, has provided one of the biggest changes to the regulatory regime for the design, procurement, construction and management of buildings for a very long time. As a result, we have included a special "pull-out" section which gives you all you need to know about the latest legislative updates and court decisions. This can be found at pages 26-39.

Ben Smith, together with Samantha Jones from 39 Essex Chambers, provides advice on surviving the new higher-risk buildings regime, focusing on the role of dutyholders, gateways and the golden thread. Huw Wilkins looks at the powers of the building regulator. Lucinda Robinson considers the impact of the BSA on downstream claims, and Rebecca Penney looks at limitation periods. Finally, George Boddy reviews the RAAC (or reinforced autoclaved aerated concrete) crisis, considering how claims might be made.

Adjudication remains a focus of our *Reviews*. Martin Ewen at pages 22-23 discusses the Part 8 procedure, which often features in adjudication enforcement claims, whilst Edward Farren, at pages 24-25, looks at the use (and dangers) of using insolvency procedures to provide a quick alternative route to obtaining outstanding payments.

We also take a deeper look at PFI contracts. At pages 42-43, Edward Lowery highlights the most important issues arising from the court judgments handed down over the last 12 months, and then Gemma Essex and Laura Bowler at pages 44-45 explain why there is a need for careful relationship management between the parties when it comes to the handback process.

Earlier this year, the Institution of Chemical Engineers ("IChemE") published its Engineering, Procurement and Construction Management ("EPCM") contract into the market, known as "the Blue Book". With other publishing bodies like FIDIC expected to follow suit in the near future, at pages 48-49 Mark Pantry reviews the industry's first attempt at a standard form EPCM contract.

Our Fenwick Elliott *Blog* remains a popular feature of our website, featuring a wide range of short thought leadership and more traditional in-depth reviews of key issues. Andrew Jeffcoat provided a good example of the later approach with an analysis of a Court of Appeal decision about the nature, scope, and effect of a co-insurance policy. You can find that at pages 64-66.

Claire King was one of the authors of the recent NEC and CLC Guidance Note for dealing with retention payments under the NEC3 and NEC4 Contracts. In contrast to the JCT standard form, the NEC has made retention an "*opt-in*" rather than "*opt-out*" option in its contract suite with the aim of making those entering into construction contracts think twice before defaulting to what they have always done. At pages 12-14, Claire looks at the industry-wide reasons for moving away from retentions and then reviews the possible options for alternatives that are available.

The suspension or termination of a construction contract is a serious step. Stating the obvious, the safest, indeed, the only course of action for the employer or contractor is to carefully follow the terms of the contract in question. In companion articles, at pages 15-19, I review recent court guidance from the UK about termination and from South Africa about suspension under the FIDIC Form.

Events of the past few years have brought home to us all the importance of energy security. As Rebecca Cook and Nicholas Gould explain at pages 40-41, the world is using more energy each year, not less. While the rate of growth has slowed (now averaging around 1% to 2% per year), overall consumption continues to grow. They then go on to discuss what can be done.

There have been a number of changes to the way international arbitration is carried out. In a further step to promote the Middle East as a global hub for arbitration, both the Kingdom of Saudi Arabia ("KSA") and the United Arab Emirates ("UAE") have recently made changes to their arbitration frameworks, modernising and strengthening arbitration in the region. Shahed Ahmed and Natalie Mackay, at pages 20-21, take you through those changes.

The other key issue which we cannot ignore is the continuing impact of technology. With that in mind Stacy Sinclair opens our *Review* at pages 8-11, with a closer look at generative AI's transformative potential within construction law, among other sectors.

Our website (www.fenwickelliott.com) keeps track of our latest legal updates or you can follow us on Twitter or LinkedIn.

As always, I'd welcome any comments you may have on this year's *Review*. Just send me an email to jglover@fenwickelliott.com or find me on X (formerly Twitter) at @jeremyrglover.

Jeremy Glover

Simon Tolson
Senior Partner

Welcome to the captivating realm of our *2023/24 Annual Review*, the 27th edition that brims with compelling content waiting to be explored.

As we delve into the past year, reflecting on the tumultuous 2023, akin to the challenging years of 1991 and 2008-10, the echoes of uncertainty still reverberate in the construction industry. Despite these trials, the resilient spirit within the construction, infrastructure, and related domains persists.

I've had the privilege of participating in *Building Magazine*'s Building the Future Commission, a year-round exploration of radical and challenging ideas aimed at transforming the built environment. The consensus among industry leaders, echoed by Sir John Armitt, chair of the National Infrastructure Commission, is the imperative need for collaborative, long-term planning between public and private sectors. This plan must be adhered to steadfastly, spanning longer than five-year government terms and bridging the gap between high-level aspirations and on-the-ground execution.

A critical issue unearthed during our discussions was the gap in education. The construction sector demands a strategic investment to align education with its needs, addressing the escalating skills shortage. Fenwick Elliott proudly supports the Construction Youth Trust, a charity dedicated to fostering young talent and inspiring them to pursue careers in the construction industry.

The looming Building Safety Act poses challenges, with the need for education, training and skills identified as key barriers at the Building the Future Commission Conference. The ongoing reforms in building safety demand our understanding and proactive engagement as the industry undergoes a much-needed transformative shake-up.

Venturing into the technological frontier, our exploration of the generative AI revolution reveals the profound impact of technology on construction law. From 4D and 5D models, digital twins and Building Information Modelling ("BIM") models (used for visualising and creating VR renderings for projects) to mapping and charting drones, AI and smart contracts (thanks to blockchain), technology has brought about unprecedented advancements, yet not without presenting intricate legal challenges as we segue from traditional to new ways of working. I am passionate about managing this change in the firm and am closely involved in these issues through my participation in TECSA's AI working group and forthcoming draft AI guidelines.

Bridging the gap between human-centric construction law and technological advancements requires a harmonious blend of legal expertise, industry insight and a wholehearted embrace of innovation. From continuous learning and ethical tech considerations to evolving dispute mechanisms and collaborative teamwork, our approach must be dynamic. Here at Fenwick Elliott, we are launching our own smart AI tools to help decipher mountains of data and enhance our services.

In the realm of achievements, Fenwick Elliott proudly maintains its Tier 1 status in both the *Legal 500* and *Chambers and Partners*' UK Guides. The firm's recognition extends globally, with accolades such as FIDIC Law Firm of the Year and a nomination for the Oath Middle East Legal Awards. I want to thank all my partners and staff for the huge work they have all put in over the past 12 months. The comments from peers and respondents are a testament to our record of efforts and reputation:

"The only firm of out-and-out construction specialists in London. Great team with in-depth knowledge of our subject matter."

"Strong construction focus and industry expertise."

"The firm has a great ability to see the small details in complex matters while not losing sight of the overall commercial objectives that drive our business."

"The team are very capable of thinking outside the box and are always prepared to provide an inventive solution to our problems."

"Fenwick Elliott are very proactive in dealing and managing complex disputes."

Since the firm's inception over 35 years ago, we have grown from two to 25 partners, with over 100 staff. Our strategy has always been to bring together the best construction lawyers as a dedicated team for clients needing advice in this one specialist area of the law. I am immensely proud of our achievements which are a recognition of the hard work, determination and loyalty of everyone. I would just like to introduce our three new partners.

- **Leonie Sellers** joined us in our international hub in Dubai in 2022 as a Senior Associate. Her rapid promotion to the Partnership reflects not only her abilities but the impressive growth happening in Fenwick Elliott's Dubai office.
- **Mark Pantry,** a non-contentious specialist, has been with us since 2019 and spent nine months on loan working in-house with an international contractor. Mark is stepping up as the third partner in our flourishing non-contentious team.
- **Edward Farren** has been with us for over 25 years. Today, Eddie specialises in helping clients get paid and business development and is our first Business Development Partner. Eddie's promotion is a nod to his significant contributions to client relationships and the firm's growth.

I could not be happier about these promotions; they highlight our commitment to fostering talent across various teams and locations for the construction and energy sectors.

Fenwick Elliott remains committed to promoting equality, diversity and inclusion. Active participation in initiatives such as the 10,000 Black Interns programme underscores our commitment to transforming prospects for young individuals.

It is also important to me to see our team lead by example. Claire King continues to play prominent roles in the Adjudication Society's Women in Adjudication and mentoring initiatives. Karen Gidwani has established a working group on diversity within TECSA, which has published an ED&I policy, and she is now working closely with the TECSA Adjudication Sub-Committee on diversity in adjudicator nominating bodies, looking at widening the adjudicator panel.

2023 also marks the 150th anniversary of the TCC as the specialist construction court in the UK. Mr Justice Waksman led the vanguard, and I was heavily involved with the programme as was my partner Dr Stacy Sinclair. Dame Sue Carr's appointment as Lady Chief Justice is a testament to the court's progressive spirit and the quality of the judges who lead and pass through it.

Reflecting on this milestone, it was a pleasure to contribute an essay, with Stacy, entitled: "The TCC and Developments in Technology and Innovation", to the excellent publication: *The History of the Technology and Construction Court on its 150th Anniversary Rewriting the Rules*. The TCC has always embraced and pioneered the use of technology to improve case and document management and I have no doubt that the TCC's innovative approach to digital transformation has placed it in good stead to adapt to the continued rapid future developments that we are going to see. Here's to the next 150 years!

Our commitment to knowledge-sharing persists through our many publications, webinars and thought leadership. Monthly webinars, even amidst the pandemic, continue to draw a global audience, providing insights into the latest industry developments. Whether it is an update on the latest Building Safety legislation or adjudication enforcement courts or a practical look at concurrency, bonds or claims, we welcome a regular audience from the UK and around the globe.

In closing, this *Annual Review* is not a mere self-indulgence, but a testament to our dedication to industry insights. Rather than focusing solely on our achievements, we aim to contribute to discussions on cases and developments in our market over the past year, offering a glimpse into the road ahead. If you wish to delve more deeply into any topics discussed, we welcome your inquiries. The Fenwick Elliott team is here to help navigate the ever-evolving landscape of the construction industry.

Lastly for now, as a sector-focused law firm, we pride ourselves on our extensive industry expertise. So, rather than talk solely about ourselves and the work we have been doing for our clients, this *Annual Review* is instead based on articles which give our take on cases and developments in our market over the past 12 months – and where things are heading in the year to come.

If you would like to discuss any of the points raised in these pages in more detail, please do not hesitate to contact any of us. As always, we are here to help. ■

Simon Tolson

"This Annual Review... is a testament to our dedication to industry insights... [we are] here to help navigate the ever-evolving landscape of the construction industry.

AI is about to completely change construction law

Since the release of OpenAI's ChatGPT a year ago, AI has taken the world by storm, revolutionising how we interact with technology and sparking debate about the balance between technological advancements and ethics, privacy, and the changing nature of the human-computer interaction. **Stacy Sinclair** discusses the impact of AI on construction law and what the future may hold for our industry.

The Collins English Dictionary named "AI", the abbreviation for artificial intelligence, as the most notable word of 2023.[1]

This comes as no surprise. Since the release of OpenAI's generative AI platform ChatGPT to the public in November 2022, AI consistently has been the subject of debate, frequently making news headlines, and has even motivated governments to take action quickly. From Italy's temporary ban of ChatGPT in April 2023 to the world's first AI Safety Summit in the UK in November 2023, which brought together 29 governments and other key international institutions and major AI companies, AI certainly is a force to be reckoned with.

The title of this article shamelessly is derived from the title of Bill Gates' recent *Gates Notes* blog, "AI is about to completely change how we use computers".[2] In the blog, Gates explains how, within five years, there will no longer be different apps for different tasks. Rather, using a type of software called an "agent", you will simply tell your device what to do in natural language. Agents, which have only recently become possible with the advancements in AI, are much smarter than "bots" and are set to revolutionise how we live, work and interact with computers.

The same holds true for construction law. Advancements in AI are about to completely change how we practise construction law. AI stands at the intersection of innovation and construction law, and is set to transform our processes and practices, thereby reshaping and challenging our traditional ways of working.

This article builds on an article I wrote back in January 2019, "AI & Construction Law: an essential and an inevitable partnership",[3] an article which I consider still currently valid and very much relevant – though soon could be quite dated, particularly if Bill Gates' prediction of agents holds true.

In that article I concluded by stating that there is a significant amount of hype around AI and that if you are not utilising AI now, you certainly will be, to some degree, in the very near future – either by choice or by obligation. I was correct about our use of AI and wrong about the level of hype. AI certainly was on the Gartner Hype Cycle, but at that point, only in the "*innovation trigger*" stage. Little did I realise that four years later ChatGPT would explode into the market, skyrocketing generative AI to the top of the cycle, the "*peak of inflated expectations*", meaning that it is projected to reach transformational benefit within two to five years.[4]

In other words, within two to five years, AI will completely change construction law.

In August 2023 I joined a panel at the 11th IBDiC International Congress in Brazil, hosted by the Brazilian Institute of Construction Law and the International Construction Law Association, to consider "Artificial Intelligence in Construction Law". The following sections document some of the topics I discussed then, and outline how AI will transform construction law.

AI is not new

Even though AI has been in existence for nearly 75 years, it was not until 2023 that its capabilities expanded to a level where it could become an integral part of daily life and industry and it became widely accessible and affordable to the general public, allowing for its potential to be fully utilised.

AI, a term coined by John McCarthy at the Dartmouth Summer Research Project on AI,[5] dates back to the 1950s and is based on technical ideas from others long before that, including those of Alan Turing. The goal of the Dartmouth project was to build a machine that could do what the human brain could do and the participants naively did not think it would take that long.[6] The same was said of the resolution of WWI.[7]

By the 1960s, AI's use in law was already being considered and contemplated. Reed C Lawlor, a member of the State Bar of California, speculated that computers would one day become able to analyse and predict judicial decisions, by feeding a set of facts into a machine that has cases, rules of law and reasoning rules stored in it.[8]

Following this, the use of AI in construction law was first seen in 1988. Professor Philip Capper and Professor Richard Susskind OBE, now the President of the Society for Computers and Law in the UK and Technology Adviser to the Lord Chief Justice of England and Wales, developed a rule-based expert system for the Latent Damages Act 1986.[9] As Professor Susskind explained, it was essentially a hand-crafted AI system, a decision tree with over two million paths to assist lawyers through the not-so-easy to digest legislation.

Since then there of course have been decades of research and development, particularly in computing power, and we have seen various breakthroughs over the years. Two examples include the moment the IBM supercomputer, Deep Blue, defeated grandmaster and then-world champion Garry Kasparov in chess in 1997, and when the computer system, Watson, won *Jeopardy!* in 2011 against human champions Brad Rutter and Ken Jennings.

With the release of the generative AI ChatGPT in November 2022, it is only within the last year that we see generative AI exploding into the market and the general public becoming more aware of AI (either generative or otherwise) and indeed having free access to generative AI. By 1 November 2023, even King Charles III is addressing the development of advanced AI which he said is "*no less important than the discovery of electricity*".[10]

For those not aware, ChatGPT is just one of a number of generative AI tools available. It is essentially a chatbot, built on a large language model, that can answer questions, tell stories, produce essays or presentations, generate and summarise text, write code, etc., in response to questions or prompts. ChatGPT is but one of a number of generative AI tools now on the market.

AI is no longer an out-of-reach, inaccessible technology. It has crossed a threshold of completing tasks at a higher quality level than humans can, at a much faster rate.[11] Now, industries, companies and (indeed) individuals, are grasping and grappling with what to do with it. The release of ChatGPT quickly brought AI to the foreground with sharp focus, despite its long-standing history.

Generative AI and the law

In terms of the legal industry, the use of generative AI first made recent headlines in February 2023 when a Columbian judge declared that he had used ChatGPT in his decision.

Judge Padilla stated that he had used ChatGPT in his decision where he concluded that the entirety of a child's medical expenses and transport costs should be paid by his medical plan as his parents could not afford them. Judge Padilla defended his use of the technology, suggesting it could make Colombia's legal system more efficient. That said, he did not use ChatGPT alone. In the usual way, he had precedents from previous rulings to support his decision.[12]

Then in the spring of 2023, a New York lawyer who was representing an individual claiming against an airline in a personal injury case used ChatGPT for legal research. ChatGPT fabricated cases, perhaps because of the way the lawyer phrased his prompt. It appears the lawyer did not check the case citations generated by ChatGPT, and used the false cases blindly. However, the judge ***did*** check, and the lawyer was fined US$5,000.[13]

These are but two examples which demonstrate how generative AI is already being experimented with and utilised to a certain degree within the legal profession.

> *Generative AI is already being experimented with and utilised to a certain degree within the legal profession.*

Whilst AI has tremendous, transformative potential and is rife with opportunities for construction law, equally there are critical considerations and challenges which users must be aware of and address. The technology is powerful but is still maturing. A few crucial points to note:

- **Privacy and confidentiality:** If using the openly available platforms (i.e., ChatGPT), any data uploaded or inserted into the platform is not private. The data and information can be viewed and possibly even used by others. To be clear, platforms such as OpenAI's ChatGPT are ***not*** secure, private, confidential environments. Private platforms are available, but their privacy and security should be vetted before use.
- **Hallucinations:** Generative AI platforms are still at a point where they have the potential to "hallucinate" or fabricate information. As such, these platforms should be seen as providing access to a super-charged and super-intelligent assistant, whose outputs must be checked and verified by a human.
- **Ethical considerations:** As AI systems learn from historical data that might perpetuate systemic issues, there are real concerns encompassing bias and fairness. Ensuring that AI remains a tool for justice rather than a source of exacerbation requires careful calibration and oversight.
- **Not industry-specific and/or up to date:** Depending on which AI system you are using, it may or may not be specific to law and/or designed as a legal tech tool. The underlying data which it is learning and drawing from may not necessarily be legal-focused and/or up to date. Therefore it is imperative to understand the platform you are using. For example, ChatGPT 3.5 is only up to date as of January 2022 (previously September 2021), whilst ChatGPT 4.0, available for "Plus" users, is real-time, browsing the internet and analysing data as it processes.[14]

Given these considerations and others, generative AI in legal practice must be used with caution.

As a result, the industry appears to be in a state of "consideration". By this, I mean considering how to use generative AI, how to increase productivity and enhance services, and what processes and procedures can be automated or made more efficient with this technology. Companies globally are working with technology providers to develop and use generative AI in a secure, private and trusted environment, so that they can harness its power and start to reshape work processes fundamentally within their organisations.

As generative AI is now at the "*peak of inflated expectations*", whilst it is not yet at a point which it can do everything we expect it to, we nevertheless are on the cusp of something big here: an AI-driven future. Perhaps in the short term, over the next few years, we will see incremental change and a lot of experimentation; but certainly in the next decade to come, we will see those who have embraced the inevitable change and those who have not and are struggling to keep up as a result.

As we look to the AI-driven future of construction law, it is clear that contract analysis, tribunal selection processes, the predictability of dispute outcomes and the use of AI in decision making are set to see fundamental change.

Contract analysis and contract review

Advancements in AI in respect of contract analysis and contract review were in play well before generative AI was released in the market last year.

Various legal tech applications exist with the sole purpose of assisting with the productivity of a contract review: enhancing accuracy, speed and consistency, and/or automating and streamlining various tasks that would otherwise require substantial time and effort from legal professionals. Many of these applications are machine learning, so that the system learns what is good and what is bad, or rather, what is an acceptable level of risk to the company.

Some possible use cases include:

- **Automated data extraction and data entry:** AI can scan contracts and extract key information such as parties' names, dates, clauses and obligations. This can eliminate the need for manual data entry and ensure accuracy in capturing crucial details. This may be particularly helpful in due diligence exercises and/or managing risk across large quantities of similar contracts, e.g. supply contracts or subcontracts.
- **Clause identification and analysis:** AI can identify specific clauses within contracts, such as indemnity clauses, confidentiality clauses, termination clauses, etc., speeding up the process of locating important sections for review.
- **Monitoring contractual risk:** This topic is very much in spotlight just now. Companies are keen to develop solutions which align to their internal policies and "playbooks". AI has the potential to assess contractual risk by comparing clauses/contracts against predefined criteria, company policies and/or legal standards/regulations. If an AI system has been trained on a playbook, it can identify whether a clause is likely to be company-approved and/or whether it contravenes any liability limits or caps, along with which negotiation possibilities or variations on a clause may be acceptable. By highlighting clauses of concern and flagging which clauses need further human review, this helps prioritise review efforts and focus on high-risk issues.
- **Consistency checks:** AI can detect inconsistencies or contradictions within a contract or between multiple

contracts. This ensures that the terms and conditions are coherent and aligned throughout.

- **Cross-referencing:** AI can cross-reference various sections of a contract to check for inconsistencies or conflicts. It can also cross-reference clauses with relevant legal precedents or regulations.
- **Workflow automation:** AI and other technologies can help create and manage workflows for contract review. It can assign tasks, track progress and notify relevant parties when specific actions are required.

Some of the above examples are not necessarily available "*out-of-the box*" just yet and may take time and money to develop and configure to specific requirements.

AI can be a powerful tool and assistant in contract review and analysis, but it certainly does not entirely replace human expertise. Legal professionals still play a critical role in making final judgments, especially in complex or nuanced situations, which of course tends to be the case with construction contracts.

Importantly, if you are in the market for a review platform, do not start with the tech – start with the outcomes. What do you need it to do? Define the outcomes first or you may end up paying for something no one uses.

Selecting tribunals and predicting outcomes

With regard to using AI to select tribunals or better predict the outcome of a dispute from court judges or arbitration tribunals, the underlying issue here is data: having access to data and surfacing data-driven insight, so that a party can make data-led decisions, either for selecting tribunals (e.g., in international arbitration) or predicting outcomes in court cases.

As with contract review platforms, there are various platforms or databases commercially available, driven by AI and natural language processing, which (if you have access) may assist. These platforms tend to be available via paid subscriptions, much like most legal research databases.

One point to note is that, like any other system, rubbish in equals rubbish out. If a platform only has limited data or contains data which is confined to a particular time period or jurisdiction, it can be unhelpful. It is important to note what the purpose of the database is and what data it is drawing from.

The functionalities in this area include:

- **Data analysis and data comparison:** analysing vast amounts of data from previous arbitration cases, legal precedents and tribunal compositions to help identify patterns and preferences in the selection of arbitrators for specific types of cases.
- **Predictive analytics:** using historical data to make predictions about the likely behaviour, rulings, and outcomes of different arbitrators or judges, to help lawyers and clients in choosing and/or aligning objectives and expectations.

An American example is Lex Machina. This was developed originally by Stanford University and acquired by LexisNexis in 2015. Lex Machina focuses on using AI and machine learning to analyse and extract information from court cases, enabling lawyers and legal teams to make more informed decisions and strategic choices in their litigation processes. Originally Lex Machina predicted the outcomes of patent disputes/IP litigation, more accurately than the specialist lawyers. Today it covers further areas of law and further US jurisdictions. The platform draws from past cases, analysing vast amounts of legal data, including court records, dockets, motions, pleadings and other case-related information. It then applies natural language processing and data analytics techniques to extract patterns, trends and insights from this data regarding judge behaviour, opposing counsel strategies, case outcomes, etc.

A UK example is Solomonic. Solomonic tracks the claims, proceedings and judgments of English court cases. Like Lex Machina, its database extracts information pertaining to the parties, the law firms representing those parties, the issues in the case, the judge, counsel, how each case was decided, the experts in the case, any positive or adverse comments on that expert in the decision, and other key data. This allows for a searchable database, providing insight into how particular judges decided on particular legal issues, and the chance that the particular judge is likely to find in favour of the claimant or the defendant, based on past cases.

Notably Solomonic also uses an experienced team of human legal specialists to sense check and add an extra dimension to the software's results. Accordingly, Solomonic is combining big data analytics with human input. It is not necessarily predicting the outcome of the actual case at hand; rather, it is providing deep data-led insight for the lawyers to have a better shot at doing so.

Other smaller start-ups have come and gone, but nevertheless those start-ups have shown that where the AI solution was asked to predict the outcome of an actual case, it often did so better than the human lawyers.

In October 2017 software developed by a Cambridge start-up company CaseCrunch (which has since dissolved) predicted the outcomes of 775 PPI mis-selling claims. The software was asked to predict "*yes or no*" as to whether the financial ombudsman would succeed in the claim. The software had an accuracy of 86%. The 112 lawyers who analysed the same 775 claims had an average of 62.3%. CaseCrunch said that if the question is defined precisely, as was the case with the 775 PPI claims, *"machines are able to compete with and sometimes outperform human lawyers".*

It is important to note that the use of analytics to predict outcomes is not legal in all jurisdictions. Article 33 of the Justice Reform Act in French law prohibits judicial analytics: "*The identity data of magistrates and members of the judiciary cannot be reused with the purpose or effect of evaluating, analysing, comparing or predicting their actual or alleged professional practices*".[15]

The use of AI in decision-making

The use of AI in decision-making is already underway.

At the outset of this article I referenced Judge Padilla making use of ChatGPT in his decision-making. The judge said, "*by asking questions to the application, we do not stop being judges, thinking beings*".

This sentiment is mirrored by Sir Geoffrey Vos, Master of the Rolls and Head of Civil Justice in England and Wales, in his speech at the Law and Technology Conference to the Law Society of Scotland in June 2023. In that speech, Sir Vos predicted:[16]

- AI was likely to make decisions on certain types of legal disputes in the future; and
- whilst it is unlikely to replace human beings in judicial decision-making in complex, personal cases, it could provide solutions for certain types of civil disputes.

Sir Vos warned that while AI, such as ChatGPT, has the potential to be a valuable tool (and no doubt lawyers will not be able to stand aside from the use of generative AI given that clients will insist it being considered if appropriate) it is not infallible and should be used in conjunction with human judgment and expertise.

Sir Vos noted that ChatGPT itself has said: *"Ultimately, legal decision-making involves a range of factors beyond just predicting the outcome of a case, including strategic and ethical considerations and client goals".*

We perhaps are not yet at the point where an entire decision can or should be entirely produced by the machine alone, but watch this space. The challenge is how to use AI appropriately and safely given its current state of development.

The use of AI in adjudication decisions: TECSA AI Guidance Note

Litigation and arbitration are not the only forums for decision making, and construction adjudication too will need to grapple with the ethical and technological challenges of AI.

The Technology and Construction Court Solicitors' Association ("TECSA") has recognised that AI and generative AI is here to stay and its use will only exponentially increase in the future. As its adjudicators must keep abreast of developments in AI, its potential benefits and uses, as well as its risks and limitations, TECSA recently released a "Guidance Note for TECSA Adjudicators on the use of Generative AI".[17]

The short guidance note highlights various issues including data privacy and security, responsibility and supervision, transparency and ethical considerations and bias. Notably the guide reminds adjudicators that they remain personally responsible for their decisions, regardless of what tools are used in drafting and/or research (e.g. generative AI or otherwise).

AI has undeniable potential in aiding legal decision-making in construction law. However, a balanced and informed approach is essential to ensure justice, fairness and efficacy.

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Conclusion

Not only did the Collins English Dictionary recognise the significance of AI in 2023, but so too did the Technology and Construction Court (TCC) in the UK. 2023 marked the 150th anniversary of the TCC and the year was filled with a number of importance conferences and celebrations. At the Gala Dinner on 2 November, which brought the anniversary to a close, Sir Rupert Jackson highlighted the importance of AI, stating: *"we should be maximising its benefits, whilst taking into account its risks".* Hear, hear!

I asked ChatGPT to write a two-paragraph conclusion for me for this article. It drafted the following:

> *"In conclusion, the advancements in AI, particularly generative AI, are set to revolutionise the practice of construction law. From enhancing contract analysis and review to aiding in the selection of tribunals, predicting dispute outcomes, and assisting in decision-making, AI holds transformative potential. However, it is crucial to approach this technology with a balanced and informed perspective, considering issues of privacy, data security, ethical considerations, and the need for human oversight.*
>
> *As we stand on the cusp of an AI-driven future, it is essential for legal professionals to embrace this change and adapt to the evolving landscape. The use of AI in construction law is not about replacing human expertise but about leveraging technology to enhance efficiency, accuracy, and fairness. While the journey towards fully integrating AI into legal practice may be filled with challenges and uncertainties, the potential benefits it offers are undeniable. The future of construction law will be shaped by those who can effectively harness the power of AI while navigating its complexities and risks".*

A bit boring, but pretty good. I think I prefer either Sir Rupert Jackson's succinct summary regarding AI, or this slightly longer one of mine:

> *"The landscape of AI is rapidly evolving. We need to embrace it as the enabler that it is, paying careful attention to its risks and challenges, or get left behind. Construction law is on the cusp of a complete transformation".* ■

1. *https://www.collinsdictionary.com/woty*
2. *AI is about to completely change how you use computers | Bill Gates (gatesnotes.com)*
3. *AI & Construction law: an essential and inevitable partnership (fenwickelliott.com)*
4. *Gartner Places Generative AI on the Peak of Inflated Expectations on the 2023 Hype Cycle for Emerging Technologies*
5. *Artificial Intelligence (AI) Coined at Dartmouth | Dartmouth; dartmouth.dvi (stanford.edu)*
6. *A Look Back on the Dartmouth Summer Research Project on Artificial Intelligence | The Dartmouth;* Metz C, *Genius Makers: the Mavericks who Brought AI to Google, Facebook and the World*, Random House Business, 2021.
7. *It'll Be Over By Christmas - First World War | Imperial War Museums (iwm.org.uk)*
8. Lawlor, R, *What Computers Can Do: Analysis and Prediction of Judicial Decisions*, 49 American Bar Association Journal 337, 1963.
9. Capper P and Susskind R, *Latent Damage Law: The Expert System*, Butterworths Law, 1988.
10. *https://www.bbc.co.uk/news/technology-67172229*
11. Mollick E, *ChatGPT is a Tipping Point for AI*, Harvard Business Review, 14 December 2022. *ChatGPT Is a Tipping Point for AI (hbr.org)*
12. *Court of appeal judge praises 'jolly useful' ChatGPT after asking it for legal summary | Artificial intelligence (AI) | The Guardian*
13. *New York lawyers sanctioned for using fake ChatGPT cases in legal brief | Reuters*
14. As at November 2023.
15. *Article 33 - LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1) - Légifrance (legifrance.gouv.fr)*
16. *https://www.judiciary.uk/speech-by-the-master-of-the-rolls-to-the-law-society-of-scotland/*
17. *https://tecsa.org.uk/*

> *While AI has the potential to be a valuable tool... it is not infallible and should be used in conjunction with human judgment and expertise.*

Retentions: get rid or retain?

During the course of the last year, **Claire King** had the pleasure of working on the NEC and CLC Guidance Note for dealing with retention payments under the NEC3 and NEC4 Contracts with a team from within the industry.[1] Unlike the JCT standard form, the NEC has made retention an "*opt-in*" rather than "*opt-out*" option in its contract suite with the aim of making those entering into construction contracts think twice before defaulting to what they have always done (i.e., provide for a retention).

One of the key issues repeatedly raised whilst speaking on the topic of retentions was what the alternatives to retention are in practice. This is obviously crucial because, in the absence of active legislation on this issue, those who are used to providing for retention need to be persuaded that there is an alternative solution to retentions to achieve the express goals of retention.[2] In this article, we look at the industry-wide reasons for moving away from retentions and then review the possible options for alternatives that are available.

What is a retention?

The BEIS Report, "Retentions in the Construction Industry"[3] ("BEIS Report") defines a retention as:

> *"a sum of money withheld from the payments for construction section projects in order to mitigate the* ***risk that such projects are not completed either at all, or to the required quality standard.*** *Retentions are mainly used as a means of* ***incentivising contractors and sub-contractors to return to correct defects*** *during a specified period of time, as outlined in the Contract Terms and Conditions".* [Emphasis added]

The BEIS Report also notes that the average retention is 5% of the contract value. From the definition above, two key reasons given for taking a retention can be discerned. These are:

1. Quality (specifically encouraging the return to fix defects during the retention defects liability period); and

2. Mitigating against the risk a project is not completed at all.

These two purposes obviously need to be borne in mind when considering alternatives to retentions.

Why does the discussion on retention matter?

The answer to this is fairly simple. The evidence available demonstrates that there are considerable downsides to retentions. Many of these are particularly pertinent when the economy is in a downturn. Some particularly alarming statistics from the BEIS Report include:

1. 44% of contractors had lost retentions due to upstream insolvencies;

2. 71% of contractors experienced delays in receiving retentions back;

3. The average delay is significantly longer for tier 2 and 3 contractors compared to tier 1 contractors; and

4. Between £3.2 and £5.9 billion is retained annually (this was in 2018).

There were also strong suggestions that retentions were being used as working capital by firms holding them. Finally, there were clear indications that tender prices were often increased because of an insistence on retention. In other words, contractors were assuming they would not get their retention back (at least not for a long time) and pricing their works accordingly.

Perhaps the most spectacular and depressing example of the impact of retentions on the supply chain when there is an insolvency was seen when Carillion collapsed. At the time, it was estimated that £800 million was being held in retentions by Carillion. This collapse had a devastating impact on Carillon's supply chain, causing a domino effect.

So, what are the alternatives?

The first question for an employer to ask when deciding whether a retention is actually required is whether retentions achieve their two goals in the first place. First, in reality, a 5% retention provides very little security for completing a job if a contractor becomes insolvent unless that insolvency occurs very late in the day. Second, as the NEC Guidance points out, and at least in theory, if quality is being monitored properly then retention should not be required to ensure the quality of the work undertaken.

With that in mind, the key alternatives to retention are broadly divided into two camps. These are namely:

1. Alternatives seeking to provide security for performance; and

2. Alternatives focused on protecting the retention funds to ensure those monies are kept safe and paid out in a timely fashion as provided for in the underlying contract.

The key alternatives that are generally recognised are as follows:

1. Project Bank Accounts;

2. Retention Bonds;

3. Performance Bonds;

4. Parent Company Guarantees; and

5. A retentions trust fund.

1. For a copy of this Guidance Note see *NEC-and-CLC-Guidance-for-Dealing-with-Retention-Payments-Under-NEC3-and-NEC4-Contracts-Final-9-11-22-1.pdf (neccontract.com)* which was a joint effort by Peter Higgins of PD Consult, Nicola Walters of the Department for Business, Energy and Industrial Strategy, Andrew Croft of Beale & Company Solicitors LLP and myself.

2. This of course assumes that retentions achieve their purpose in the first place which is heavily debated within the industry.

3. *Retentions in the Construction Industry (publishing.service.gov.uk)*

4. The New Zealand Government's website notes: *"The Construction Contracts (Retention Money) Amendment Act 2023 (the Amendment Act) was passed by the Government in April 2023. The Amendment Act strengthens the retention money regime by making it easier for subcontractors to access retention money without a court order, in the event of a head contractor's insolvency. The changes in the Amendment Act build on retention money provisions already in the Construction Contracts Act 2002. These provisions were put in place to protect retention money owed to subcontractors in the event of a business failure and to ensure retention money withheld under construction contracts is responsibly managed. The Amendment Act will commence on 5 October 2023 and will become part of the Construction Contracts Act 2002".* See *New retention money requirements take effect from 5 October 2023 | Building Performance.*

5. Construction Act, RSO 1990, c. C.30 [Ontario].

6. See *Project bank account success leads to further rollout to benefit more National Highways suppliers - National Highways.*

7. See Option X13 of the NEC4 form.

8. See Option X4 of the NEC4 form.

The first two options are aimed at ensuring that retention funds are protected. The last three focus on security for performance. All of these alternatives have pros and cons associated.

What does the rest of the world do?

Perhaps the most popular alternative seen in other common law jurisdictions seems to be retentions held in a trust scheme in separate accounts. New pieces of legislation have, for example, been recently passed in New Zealand with the aim of ensuring that retention funds are protected following an insolvency.[4] In Ontario, a 10% retention hold back is mandatory, but a lien is then put over the property that the retention relates to in order to secure that money.[5] Both solutions provide security for the retention funds.

What is available in England and Wales?

In the continued absence of legislation on the topic of retention (despite draft bills being put forward), options remain limited to those that do not involve further legislation. These are summarised below.

Protection of retention funds

The options for Project Bank Accounts ("PBAs") and retention-specific trust accounts offer a degree of security for funds should an insolvency occur. Indeed, protection is provided for both the employer and the contractor. The idea is that monies are held on trust for identified beneficiaries.

PBAs have been used in public contracts since 2007 and are, indeed, primarily used in that sector. The NEC4 provides Option Y(UK)1 for PBAs. A trust deed is required, and monies are held on trust subject to the rules governing the trust and the PBA. As noted in the BEIS Report, PBAs have had some success but tend to be limited to the upper tiers of the contractual chain due to the administration involved in setting them up and the education process involved in teaching people how to operate them properly.

PBAs are increasingly widespread in government-led projects. For example, National Highways has publicly announced that they are trying to ensure that the set-up costs and administration burden for PBAs is lessened so that parties lower down the supply chain can access them.[6] Parties need to make sure they know how monies (and interest) are dealt with in the context of an insolvency. That means paying enough attention to the contractual documents governing the PBA at the time they are entered into – before it is too late to change their meaning.

Retention being held in trust accounts is another option reviewed in the BEIS Report. The idea being that the money is ringfenced and housed in a separate fund so that, if someone in the supply chain goes insolvent, those monies are protected. Despite the BEIS Report concluding that this was a viable alternative for cash retentions, these are rare in practise. Lessons may also need to be taken from New Zealand where legislation was specifically enacted to ensure insolvency practitioners did not manage to keep hold of retention funds notwithstanding there being a trust in place.

Security for Performance

Alternatives to cash retention which provide security for performance are arguably more obvious. However, most of them come with a cost attached. As such, the cost of the alternatives is a key factor in determining whether it is viable. In the current environment, where bonds are ever more expensive, these may not be viable alternatives for contractors whose credit rating is not ideal.

A performance bond[7] can ensure performance, albeit the grounds on which you can call them need to be carefully reviewed to ensure that pay outs are made upon insolvency and/or when the quality of the works undertaken is insufficient. However, generally, performance bonds are used in addition to retention, merely as the burden on the contractor or subcontractor in question and are likely to be added straight back onto the cost.

Another alternative is a retention bond and, again, these are provided for in the NEC4 as well as the JCT forms of contract. These bonds are linked specifically to retention monies and are for dealing with the same issues (i.e., defects emerging after completion). They can be recorded in the terms at the outset or during the project to get the retention, i.e., the cash released. There is obviously an upfront cost but, otherwise, they result in improved cashflow and can be made payable on demand. However, the wording of the retention bond needs to ensure that it is linked to the purpose of retention (i.e., defects) rather than wider breaches such as delay.

Finally, a Parent Company Guarantee ("PCG") may be an option where the company (perhaps a special-purpose vehicle) entering the contract has a parent company with a strong balance sheet.[8] Those accepting them as alternatives to retention need to be aware that delays can occur meaning that claims for defects have to be established and ascertained first. It is also important to establish the domicile of the parent company.

Some jurisdictions are known for being harder to trace assets than others. As such, whilst PCGs can be very effective performance for security performance, they need to be checked carefully and are only applicable if there is a suitable parent company to offer the guarantee in the first place.

Summary

In summary, then, there are alternatives to retention which should actively be considered as alternatives as opposed to additions. However, they all have their own disadvantages and advantages. Perhaps the most obvious alternative could be retention trusts, but these may require further legislative action (as seen in New Zealand) to ensure that the protection of having the monies in those trusts is adequate.

From a personal perspective, however, there is no doubt that action needs to be taken on retentions. Too often, parties hold onto retentions for as long as possible and without sufficient (or any) justification. In the current economic conditions, this is particularly alarming as those having to use retentions for cashflow are normally more at risk of insolvency. ■

> *A 5% retention provides very little security for completing a job if a contractor becomes insolvent unless that insolvency occurs very late in the day... at least in theory, if quality is being monitored properly then retention should not be required.*

Getting termination right: lessons from the courts

It is regularly said, and for good reason, that termination is a serious step, and is not to be taken lightly. As **Jeremy Glover** discusses, there are many reasons for this, including commercial, contractual, and legal. Legally and contractually, parties often find that exercising a contractual right of termination under any contract is not as straightforward as you might expect. To be valid, termination notices must comply strictly with the conditions set out in the contract. As a result, the safest, indeed, only, course of action for the employer or contractor is to carefully follow the terms of the contract in question.

There have been a number of "termination" cases which have come before the TCC over the past couple of years, and often, the party trying to terminate was found to have failed to comply with the contractual requirements.

Instances such as these can have quite serious consequences. A failure to follow those contractual requirements may in itself amount to a repudiatory breach of contract.[1] If a dispute arises, those requirements, particularly in relation to the form of notices, where they are to be served and how, and time limits will be carefully considered and strictly applied. Even where a termination notice is correctly drafted and validly served, a right of termination can inadvertently be lost where a party acts in a manner which is inconsistent with the termination of the contract.

Send the notice to the right person

In *Struthers & Anor v Davies (t/a Alastair Davies Building) & Anor* [2022] EWHC 333 (TCC), it was agreed that the first defendant could not be liable for the costs of completing the works unless the contract was validly terminated. Struthers said that they had terminated the contract in accordance with the contractual machinery.

On 23 December 2015, Struthers sent a document, a Notice of Intention to Terminate, to the first defendant's home address by email and recorded delivery. At that time, the first defendant was visiting their home in France for the holidays. On 11 January 2016, Struthers sent a Notice of Termination by recorded delivery arriving on 12 January 2016 and sent the notice by email on the same day. The first defendant pointed out, correctly in the mind of the judge, that the contract required the contract administrator (rather than the client) to issue the Notice of Intention, but Struthers had not done this. Without a valid Notice of Intention, no further notice to terminate can be sent.

Struthers relied on the decision of Akenhead J in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2015] EWHC 1028 (TCC) where, despite a notice being sent to the incorrect address (it was sent to the site office, rather than the head office), the judge had upheld the validity of the notice.

Here, the judge disagreed, noting that there were sound reasons for requiring the initial notice to come from the contract administrator rather than the client. Further, the judge was not referred to any authority where the wrong person had sent a contractual notice triggering termination where, nevertheless, the notice was held to be valid. In the *Obrascon* case, it was the address which was incorrect.

Further, the judge was not satisfied that the first defendant did receive the Notice of Intention a clear 14 days before the Notice of Termination was sent to and received, as required by the contract. There was no first-hand factual evidence from Struthers to demonstrate that the Notice of Intention to Terminate was, in fact, received and when.

However, that was not the end of the matter. The judge found that the first defendant was in a repudiatory breach of contract[2] by 12 January 2016. The result of that here was the Notice of Termination could operate as an acceptance of that repudiatory breach, even though it was not a contractually valid notice. And the first defendant was, therefore, liable for the additional reasonable costs of completing any of the works which were incomplete as of that date.

The question of ensuring that the right entity has served the notice cropped up again in the case of *Manor Co-Living Ltd v RY Construction Ltd* [2022] EWHC 2715 (TCC). Here, Manor served a default notice on 11 November 2021, under clause 8.4.1 of a JCT Standard Form Building Contract 2016. The notice was sent by email on 11 November 2021, and by post on 17 November 2021 (received two days later). The contract administrator then sent a notice (by letter dated 30 December 2021 and by email the following day) terminating the contract under clause 8.4.2. Under the terms of the contract, the contract administrator was able to serve the first notice under clause 8.4.1, but the employer had to serve the second notice under clause 8.4.2.

An adjudicator held that Manor had prematurely tried to terminate the contract before the 14-day period which was required under clause 8.4.2. Manor was, therefore, in breach of contract as it had prevented the contractor from accessing the site (Manor changed the locks as a means of blocking site access) and this repudiatory breach of contract had been accepted by RY Construction.

Follow the timing laid down by your contract

Even if you ensure that the correct person serves the notice, you must get the timing right. For example, clause 8.4.1 of both the JCT Standard Building Contract and the JCT Design and Build Form sets out an

1. And conduct will be considered to be repudiatory if it *"deprives the innocent party of substantially the whole of the benefit"* of the intended to be received for performance of the obligations under a contract.

2. Here, Struthers relied on first defendant's conduct in refusing to purchase materials for the works; using materials they had paid for on other jobs; failing to progress the works and confirming he would not and indeed could not progress the work for the Struthers until finalising other works, as together and separately being repudiatory breach of the contract.

employer's right to terminate for certain specified defaults. Under clause 8.4.1, the architect/contract administrator or the employer (depending on the form) may serve an ***initial notice*** on the contractor setting out the defaults relied on. Under clause 8.4.2, the contractor then has 14 days from this initial notice to cease the specified default(s). If it fails to do so, the employer may on, or within 21 days from, the expiry of the 14-day period serve a ***further notice*** on the contractor terminating its employment.

Clause 1.7 of the JCT Forms sets out requirements for service of notices. In particular, this clause specifies that notices should be in writing (clause 1.7.1) and, unless otherwise agreed between the parties (in accordance with clause 1.7.2), be served by hand or pre-paid post to the recipient's address in the Contract Particulars, or their registered or principal business address. Clause 1.7.4 states that, when sent by post, a notice should be sent by Recorded, Signed For or Special Delivery.

In *Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC), HHJ Davies confirmed that what clause 1.7.4 required was service at the claimant's registered office either by hand or by recorded or special delivery post. The fact that clause 1.7.4 contained specific and more onerous requirements which only apply where the contract expressly required that they should, meant in the view of the judge that any non-trivial departure should invalidate the notice.

The claimant was aware that the defendant was exercising its right of termination under clause 8.4, as the claimant's managing director, commercial manager and its solicitors had all received notice of termination by email. Further, a notice was handed over on site. However, these "notices" were all contractually ineffective. At the same time, the claimant sent notice by post in a contractually effective manner. However, this only took effect two business days later on the following Monday, but after the claimant had been excluded from the site.

What if the other party is in repudiatory breach of contract?

The question for HHJ Davies in the *Thomas Barnes* case was, therefore, whether the ineffective contractual termination and the removal from site in reliance on the ineffective contractual notice was repudiatory, in circumstances where the defendant was entitled to terminate and had communicated its decision to do before it excluded the claimant from the site, albeit in a legally ineffective manner. The judge decided it was not repudiatory for the following reasons:

(i) The claimant had by then effectively ceased all meaningful activity on site and was, realistically, in no position to move forwards to complete the works even in accordance with a proper extension of time ("EOT") had one been granted;

(ii) The claimant must be taken to have known, objectively, that the defendant was entitled to terminate under the contract;

(iii) The claimant knew that the defendant was intending to terminate the contract by receipt of the termination notice before it was excluded from site;

(iv) The claimant knew from the last section of the termination notice that the defendant was seeking to exclude the claimant from site and to secure it under and in accordance with the termination provisions of the contract; and

(v) There was no adverse impact upon the claimant in being removed from site two days earlier than it would have had to leave anyway.

Indeed, the judge commented that the:

> *"clear impression conveyed by the claimant's solicitors' email in response, stating that the claimant was accepting the alleged wrongful termination as repudiatory, was that the claimant was very pleased to be given the opportunity to leave site and to be able to advance a case founded upon repudiation".*

Therefore, although the claimant had had failed to terminate the contract in accordance with the contractual provisions, on the particular facts of the case, and the particular failings of the contractor, the claimant was not entitled to accept the defendant's precipitate termination as repudiatory. The result was that the defendant was entitled to terminate under the contract at the point when its termination notice was deemed served and took effect.

Always follow the contract procedures

Whilst the employers who failed to follow the contract, in two of the three examples, in effect got away with their mistake, do not assume that is always going to be the likely outcome.

To take one further example, this time from 1995. In *Lockland Builders v Rickwood* (1995) 77 BLR 42, the owner was not able to rely upon the alternative argument of repudiation under common law. Here, under a contract for the building of a house, clause 2 provided a mechanism whereby, if the owner was dissatisfied with the rate of building progress, they could apply to the president of the Southend-on-Sea District Law Society to appoint an architect and/or a surveyor, and (subject to the certificate of that architect or surveyor) determine the agreement. The provision provided not merely for the determination of the contractor's employment, but for determination of the agreement as a whole. The employer was dissatisfied with the rate of progress but, instead of invoking clause 2, relied upon a common law right of repudiation.

> ***It is a thousand pities that Mr Rickwood did not avail himself of the perfectly simple procedure available to him under condition 2.***

The Court of Appeal held that an express determination clause (even of this type) and the common law right to repudiate can exist side-by-side, but the common law right only arises in circumstances where the contractor displays a clear intention not to be bound by the contract. Mere delay in this case did not amount to grounds for repudiation at common law, and the owner had only themselves to blame for not following the contractual procedure.

Conclusions

When it comes to terminating a contract: if a party incorrectly terminates, then they will, in general, be liable to the other party for the losses resulting from that incorrect termination on a repudiatory basis. Whilst the courts may construe a termination clause in accordance with its commercial purpose, always assume that they will require strict compliance with any conditions precedent as to where and how to serve the notice, who to serve it on and when such a notice can be served and/or takes effect.

The case of *Brown & Docherty Ltd v Whangarei County Council* [1990] 2 NZLR 63 may be over 30 years old, but it provides a sound and helpful example of the principles that apply when considering termination clauses:

(i) Termination clauses must be interpreted strictly.

(ii) For a termination to be valid under the contract, the correct procedure must be complied with.

(iii) A professional consultant (such as an engineer or architect) must act fairly and impartially in the exercise of any discretion to issue a contractual certificate or notice that may be relied upon by the employer as grounds for determination.

(iv) The contractor must be given fair warning that continuation of his conduct may result in termination and should not be lulled into assuming that he would be permitted to continue with the work.

(v) A certificate or notice issued by the architect or engineer in reliance upon incorrect or irrelevant information or grounds (such as claims for additional payment and requests for further extensions of time) will be invalid. ■

For a termination to be valid under the contract, the correct procedure must be complied with.

Exercising the right to suspend: how does the FIDIC form work?

We have written separately about termination in this year's *Review*. What about suspension? In the event of a breach of contract by the employer, this can easily be seen as a more commercially acceptable approach – a warning to the employer. However, as **Jeremy Glover** explains, like the right to terminate, suspension must be exercised carefully. Any notices must follow the form required by the contract and be sent to the right entity or individual.

As a starting point, there is no common law[1] right that allows suspension of performance of the works. Therefore, the right to suspend depends on what your contract says or what is implied into your contract by statute.

The Housing Grants Act

In the UK, where the Housing Grants, Construction & Regeneration Act 1996 as amended (the "UK Housing Grants Act") applies, section 112[2] allows a statutory right of suspension in the following way:

(i) Where a party wrongfully withholds payment after the final date for payment of a sum due under the contract without giving an effective notice of intention to withhold payment.

(ii) The right to suspend may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

(iii) The right to suspend performance ceases when the party in default makes payment in full of the sum outstanding.

In addition, where the right to suspend is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right, and any period during which performance is suspended shall be disregarded in calculating any extension of time.

The FIDIC form

The FIDIC form operates in a similar way. Sub-clause 16.1 of the 2017 Form provides that a contractor may (only) suspend or reduce the rate of work in the following circumstances:

(i) if the engineer fails to issue a timely interim certificate;

(ii) if the employer fails to provide financial information about the arrangements in place to pay the contract price;

(iii) if the employer fails to pay any sums due; or

(iv) if the employer fails to comply with an engineer's determination or a DAAB decision.

Before the contractor can suspend, it again must give notice, here of 21 days. That notice must comply with the formalities of sub-clause 1.3. These require that the notice must be in writing and must state that it is given under the sub-clause in question. It is recommended that the notice also set out the grounds (which are of course strictly limited to the grounds listed within this sub-clause) for the suspension.

If the default is remedied, the contractor must resume work as soon as reasonably possible. But, again, where the suspension is valid, the contractor is entitled to claim for delay or cost plus reasonable profit in accordance with clause 20. This would include de- and re-mobilisation costs incurred as a direct result of the suspension.

Both the UK Housing Grants Act and the FIDIC form allow parties to suspend in part, which provides contractors with a range of options if faced with non-payment. Under the FIDIC form, sub-clause 16.1 requires that the contractor give 21 days' formal notice before it may suspend the work, as opposed to the seven days stipulated in the Housing Grants Act. This may cause cash-flow difficulties for some contractors who will have to continue working despite not being in receipt of payment.

Operating the FIDIC provisions

The question of the right to suspend under the FIDIC form was considered in 2022 by the South African High Court in the case of *Ndlambe Local Municipality v Quality Filtration Systems (Pty) Ltd & Anor* (3574/2022) [2022] ZAECMKHC 83.

The contractor, QFS, suspended work for non-payment by the employer, NLM, of sums certified by the Employer's Representative ("ER"). NLM said that QFS had not given proper notice under sub-clause 16.1 and had breached their contract by suspending works.

The project was for the provision of both a sea water reverse osmosis plant and a reclamation reverse osmosis plant. The contract was based on the FIDIC Gold (Design, Build and Operate) Form 2011.

The ER issued payment certificate 12 on 21 June 2022. Under sub-clause 14.8, payment was then due 56 days from the date when the payment certificate was submitted. On 22 August 2022, QFS wrote to NLM noting that no payment had been made as required under sub-clause 14.8.

QFS then wrote to the ER dated 20 September 2022. This letter was headed "*Notice: PC12 – Sub-clause 16.1: Contractor's Entitlement to Suspend Work (2)*" and continued:

> *"On 13 September 2022, QFS notified the Employer of its duty to pay and stated that should the Employer fail to action the payment of PC12, by the 20th September 2022, then QFS will exercise their right to suspend the works as per Sub-Clause 16.1 of FIDIC DBO".*

NLM did not pay the certified sum by 20 September 2022, though the payment was made at a later date.

The ER issued a further payment certificate 13 on 25 July 2022. This too was not paid within the 56-day period and QFS sent further notices, on 9 and 26 September 2022, again referring to the right to suspend in terms of sub-clause 16.1.

Lowe J said that there was no doubt that sub-clause 14.8 required payment of interim payment certificates within 56 days of receipt of the corresponding statement and supporting documents. There was no dispute that the payment certificates were given as indicated in respect of 12 and 13. Payment certificate 13 remained partially unpaid. That certificate was the basis for the decision to finally suspend the works by QFS.

Further, sub-clause 14.8 itself, which did not provide for or require any notice, did, however, provide strict time limits upon the employer within which to pay. Under sub-clause 16.1, upon failure to make a sub-clause 14.8 payment timeously, the contractor may, not less than 21 days after giving notice to the employer, suspend work. It was clear that this sub-clause enabled a contractor to suspend work and in doing so:

> *"put pressure on [the employer] to honour its payment obligations without taking the step of terminating the contract or unlawfully refusing to work if not paid".*

The judge was of the view that the QFS notice:

> *"more than clearly identifies the document as a 'notice' and refers again more than clearly to LoC140 being 'Notice 14.8 Delayed Payment'. In terms, the notice then continues to set out the time line being a due date for payment on 29 August 2022 in respect of payment certificate 13. However, there was a delay in respect of the issue of a notice, and LoC141 is referred to being a letter of 9 September 2022 'as per the requirements of sub-clause 14.8'. It is clear in the context of the papers and annexures that this is a notification to applicant concerning its failure to pay payment certificate 13 then being 'already 11 days overdue'".*

It could, therefore, not be *"seriously contested"* that, on 9 September 2022, there was written notice given by QFS that there had been a failure to pay payment certificate 13, then 11 days overdue. The 21 days started to run then, not on 26 September 2022. The letter of 26 September 2022 was also a "notice", and it referred back to the information in the letter of 9 September 2022 including reference of the entitlement to suspend within 21 days, which right would accrue on 30 September 2022.

The judge also noted that there was no suggestion that payment was not due in payment certificate 13, or that a claim was being set off against the payment certificate to justify non-payment. Further, the payment certificates were issued by NLM's own representative and payment had been repeatedly delayed. QFS had said that it could not sustain these services if it was not paid. Lowe J concluded that:

> *"it is clear on any sensible reading of the notice of 26 September which sets out fully to those involved and who would have been in possession of all the correspondence and notices, the entire time line and there can be no doubt, in my view, that on a proper reading thereof, applicant would have been more than fully aware that it had received notice in respect of the non-payment of an amount due in terms of clause 14.8, warning of the failure to pay within 21 days of the giving of the notice as being such as to entitle suspension, a reminder hereof being given on 26 September 2022, the 21 days period expiring as of 30 September 2022".*

QFS was, therefore, properly entitled to suspend works.

Conclusions

The South African case provides a good example of how suspension is supposed to operate under the FIDIC form. The employer failed to comply with its payment obligations under sub-clauses 14.7 and 14.8, which meant that the provisions of sub-clause 16.1 came into operation giving the contractor the right to suspend the works if the non-payment continued for 21 days post-notice.

This case also demonstrates the commercial considerations that come into play. The contractor did not suspend at the first opportunity and gave the employer every opportunity to make good its default before actually going forward with suspension.

And when the contractor's actions were challenged, the court went back to the basics, checking that there was an entitlement to suspend under the contract itself and then checking the formalities, whether the suspension notice complied with the formal requirements of the contract. Here, the contractor did everything right and complied with each of those requirements. The suspension was accordingly valid. ■

1. In contrast, whilst the UAE Civil Code does not recognise suspension or the concept of repudiation, article 247 recognises that a party can refuse to carry out its obligations if the other party is not performing.

2. And it is not possible for the parties to contract out of section 112.

Arbitration in the Middle East – an update

In a further step to promote the Middle East as a global hub for arbitration, both the Kingdom of Saudi Arabia ("KSA") and the United Arab Emirates ("UAE") have recently made changes to their arbitration frameworks, thereby modernising and strengthening arbitration in the region.

Shahed Ahmed and **Natalie Mackay** provide a summary of the key changes.

The Saudi Centre for Commercial Arbitration ("SCCA") announced the publication of its revised arbitration rules ("New SCCA Rules") on 1 May 2023, introducing significant changes and bringing the SCCA in line with other major arbitral institutions and international best practice.

More recently, the UAE amended its Federal Law No. 6 of 2018 ("Arbitration Law") via Federal Law No. 15 of 2023 ("Amendment"), in an effort to regulate the appointment of arbitrators and to streamline the onshore arbitration process with a view to saving costs.

KSA – New SCCA Rules

SCCA Court

Of the changes introduced in the New SCCA Rules, one of the most notable is the establishment of an SCCA Court, which replaced the SCCA Committee for Administrative Decisions. In a move reflective of other arbitral institutions, the SCCA Court will effectively assume the administrative role of the SCCA and will be in charge of administering matters related to arbitrations and mediations conducted under the auspices of the New SCCA Rules, including:

- the appointment of arbitrators and emergency arbitrators;
- challenges of arbitrators; and
- determining both the administrative fees and those of the arbitral tribunal.

Reliance on technology and the environmental impact of arbitration

An overarching and new feature of the New SCCA Rules is the promotion of the use of technology to file documents and manage cases. By way of example, the New SCCA Rules:

- allow for and encourage the electronic transmission of documents and submissions;
- permit arbitral awards to be signed electronically by the arbitrators; and
- provide that the administrative conference shall be held remotely by video conference, telephone, or any other appropriate means of remote communication, unless otherwise agreed, and further acknowledges that hearings may also be conducted remotely, or in a hybrid format.

Further, the New SCCA Rules expressly encourage the use of technology to not only optimise efficiency, but to minimise environmental impact, with arbitrators being encouraged to reduce the environmental impact of the arbitration when establishing arbitral procedures. Given the heightened global focus on sustainability and environmental impact, such changes offer a welcome move in the right direction.

> ***"The new SCCA Rules expressly encourage the use of technology to no only optimise efficiency, but to minimise environmental impact.***

Choice of law

The New SCCA Rules no longer make express reference to Shari'ah principles and only refer to the applicable law chosen by the parties. Whilst there is still the implication that Shari'ah would apply as a matter of law and public policy, this change is perhaps unsurprising given the recent announcement of the new Civil Transactions Law in the KSA which suggests that the KSA may be moving away from strictly applying Shari'ah to civil and commercial transactions.

Efficiency of proceedings

The New SCCA Rules place an important emphasis on the efficiency of the arbitration process, with the need for an efficient and cost-effective arbitration being referenced several times throughout:

- emergency arbitrators are required to issue interim awards within 15 days from the date on which the case file was transmitted to them;
- specific timeframes are granted, i.e., (i) 30 days from the commencement of the arbitration for the parties to nominate the arbitral tribunal, and (ii) the CMC is to be held within 30 days from constitution of the tribunal;
- the tribunals are granted discretionary powers to efficiently conduct the arbitration, including limiting the length of written submissions, encouraging parties to settle and striking out claims if made manifestly without merit;
- subject to certain conditions, where claims arise under multiple contracts / arbitration agreements, parties may issue a single request for arbitration;
- subject to certain conditions being met, it is permitted to consolidate two or more arbitrations; and
- unless otherwise agreed, the tribunal is to issue its award within 75 days from the date of close of proceedings.

Third-party funding

In line with both the ICC Rules 2021 and the DIAC Rules 2022, the New SCCA Rules require parties relying on litigation funding to disclose the identity of third-party funders. This is a welcome addition, both in respect of transparency and in protecting the financial interests of the parties, especially where third-party funding is becoming more prominent in the region.

UAE – Arbitration Law

Regulation of arbitrators

Previously, the Arbitration Law prohibited those sitting on the board of trustees or the administrative bodies of arbitral institution from being nominated as an arbitrator. Whilst the Amendment has extended this prohibition to include members of the executive management of the arbitral institution, the Amendment now provides exceptions to this via Article 10 *bis*, namely where:

- the regulations of the relevant arbitral institution do not prohibit the appointment;
- the competent institution has

governance rules in place to (i) regulate the work of the arbitrator and ensure the segregation of duties and impartiality and prevent conflicts of interest; and (ii) regulate the appointment, dismissal and withdrawal of the arbitrator if such conditions are met;

- the arbitrator is not a sole arbitrator or chairperson;
- the parties declare in writing their knowledge of the arbitrator's membership with the arbitral institution and they have no objection or reservation;
- the relevant arbitral institution has a mechanism for the safe reporting of violations committed by arbitrators;
- the relevant arbitrator does not sit on more than five cases per year; and
- the arbitrator undertakes in writing not to exploit their capacity in a manner that may create a conflict of interests and not to participate, deliberate, or influence the proceedings.

Further, and in a move that is reminiscent of the IBA Guidelines on Conflict of Interest, the Amendment prohibits arbitrators from having any direct relationship with the parties, which could impact their impartiality and/or independence.

Remote/virtual hearings

Similar to many other jurisdictions, following Covid-19, the UAE adopted the use of virtual hearings for arbitrations. Whilst the Arbitration Law provided the possibility of virtual hearings, the Amendment followed in the steps of many arbitral rules, including DIAC, in expressly acknowledging the use of virtual proceedings, confirming that parties can now agree on the seat of arbitration *"in reality or virtually through means of modern technology"*.

Further, Article 28 now imposes an obligation on arbitral institutions to provide the technology necessary for conducting virtual hearings in accordance with the standards and controls applicable in the State. This is likely to include e-services, such as virtual hearing platforms and online e-bundling, which are usually outsourced by the parties.

Confidentiality and evidence

Whilst the Arbitration Law previously only applied confidentiality restrictions to hearings and arbitral awards, the Amendment has extended these requirements to the entirety of the proceedings, unless otherwise agreed by the parties.

Further, the amendments under the Federal Law reinforce the tribunal's discretionary power to determine the rules of evidence, but with certain qualifications. That is, the discretionary power applies (i) *"unless otherwise agreed by the parties"*, (ii) there is no *"evidence within the law applicable to the dispute"*, and (iii) the *"rules do not prejudice public order"*.

> ***These changes are a welcome addition and consistent with the region's forward-thinking approach to arbitration.***

Closing remarks

The arbitration landscape is rapidly developing in both the KSA and the UAE, and, overall, the changes introduced over the course of the past year demonstrate further positive steps forward for arbitration in the region. It is, of course, early days and whilst it remains to be seen how the changes may impact the practice of arbitration in the KSA and the UAE, these changes are a welcome addition and consistent with the region's forward-thinking approach to arbitration. ■

CPR Part 8 claims: what are they and when should you consider starting one?

You often see parties using (or trying to use) the CPR Part 8 process during adjudication enforcement proceedings. **Martin Ewen** offers guidance to all practitioners on when it is appropriate to use CPR Part 8.

The Civil Procedure Rules ("CPR") set out the practice and procedure to be followed in the Civil Division of the High Court and the County Court in England and Wales. CPR Part 7 sets out the practice and procedure for bringing a claim and is most commonly used for claims brought in the High Court and County Court. CPR Part 8 sets out the alternative, simpler procedure for claims. Crucially, however, it is only suitable for specific claims.

A claimant may use the Part 8 procedure where they seek the court's declaration on a question which is unlikely to involve a substantial dispute of fact (CPR Part 8.1(2)). In *Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (In Liquidation)*,[1] the court held that *"[p]roceedings under Part 8 will only be entertained by the court where there is no substantive dispute on the facts"*. In *ISG Construction Ltd v English Architectural Glazing Ltd*,[2] the court noted that, in regard to the declaration sought in relation to the extension of time issue, it involved issues of fact and law *"inherently unsuitable for determination"* under Part 8.

> *Proceedings under Part 8 will only be entertained by the court where there is no substantive dispute on the facts.*

When can you use Part 8?

Matters suitable for a Part 8 claim would include a declaration on the construction of a contract or a question of law. If your dispute is likely to include a substantial dispute of fact, do not bring a claim under Part 8 as the court is very unlikely to grant the declaration(s) sought.

If a claim is started under the Part 8 procedure but the court decides that the claim involves substantial disputes of fact, the court may order that the claim be transferred to the Part 7 procedure. This was illustrated in the recent case of *Berkeley Homes (South East London) Ltd v John Sisk and Son Ltd*.[3] This dispute concerned which of the parties was liable for the alleged omissions and errors on a design on a project that involved the construction of three bridges over the Jubilee Line and Docklands Light Railway and a new station entrance at Twelve Trees Park, London. Berkeley argued was that the dispute could be resolved as a matter of pure contractual construction. Sisk objected to the use of the Part 8 procedure on the basis that determining the proper construction of the contract necessitated considering a substantial dispute of fact.

The court noted from the parties' submissions that the circumstances under which the design was developed and the Employer's Requirements drawn up were sharply disputed and this went directly to the circumstances known to the parties at the time the contract was executed, and the factual matrix was relevant to the question of construction. It was not just a question of construing the clauses in the contract. The court, therefore, held that the claim was not suitable for determination under Part 8 and declined to make any of the declarations sought. The court also noted its discretion to order a claim to continue under Part 7 and invited the parties to consider how the claim should proceed.

It is also worth mentioning the note of caution by Jefford J in *Merit Holdings Ltd v Michael J Lonsdale*[4] against the over-liberal use of Part 8. She noted that *"there is a real risk of the Part 8 procedure being used too liberally and inappropriately with the risk both of prejudice to one or other parties in the presentation of their case and of the court being asked to reach ill formulated and ill-informed decisions"*. This was referred to by the court in *Berkeley* and should be borne in mind by any party contemplating bringing a Part 8 claim.

The common theme that runs through *Berkeley*, *Merit* and other claims concerning the Part 8 procedure is the importance of there being no substantial dispute as to fact. What might at first appear to be a question of contract interpretation might, on a more detailed investigation, require consideration of substantial disputed factual issues. This would inevitably render the Part 8 procedure inappropriate.

Adjudication and Part 8

In relation to adjudication, the Part 8 procedure can be a valuable tool. A Part 8 claim can be brought before the commencement of an adjudication (e.g., if it is anticipated that the responding party will argue that there is no construction contract),[5] during an adjudication (e.g., where a responding party contests the adjudicator's jurisdiction),[6] or after an adjudication (e.g., to challenge the validity of an adjudicator's decision).[7]

A Part 8 claim can also be made by a party seeking a declaration about the validity of a payment notice or pay less notice. This tends to follow on from a "smash and grab" adjudication. Smash and grab adjudications are essentially where the paying party has failed to issue a valid payment and/or pay less notice under the provisions of the contract or the Housing Grants, Construction and Regeneration Act 1996, as applicable. Here, the Part 8 claim should be issued as soon as possible after the adjudicator's decision is issued (not merely in response to adjudication enforcement proceedings). The party bringing the Part 8 claim would then either agree with the other party that there should be one set of proceedings or ask the court that the Part 8 claim be heard together with the adjudication enforcement claim.

Whilst there is no right to appeal an adjudicator's decision, successfully obtaining declaratory relief by way of a Part 8 claim can have the same effect. In *Willow Corp S.A.R.L. v MTD Contractors Ltd*,[8] Pepperall J upheld a Part 8 claim relating to a major part of an adjudicator's decision (relating to liquidated damages) and prevented enforcement of that part of the decision. Pepperall J also commented that Willow had complied with *Hutton Construction Ltd v Wilson Properties (London) Ltd*[9] as it "*took the proactive step of issuing its Part 8 claim without waiting for MTD to launch enforcement proceedings*" and the question of construction was "*short and self-contained and well-suited to being determined in Part 8 proceedings*". Therefore, rather than the "*pay now, argue later*" approach that applies generally in adjudication, Part 8 proceedings can, in certain clearly defined circumstances, enable a party to avoid parts or all of an adjudicator's decision. That said, if the adjudication enforcement proceedings would be delayed substantially so that the Part 8 claim could be heard at the same time, the court might refuse to order that both be heard together. In such circumstances, the Part 8 clamant would not avoid the "*pay now, argue later*" principle in adjudication. [10]

Drafting the declaration

Care should be taken when drafting the declarations being sought in the Part 8 claim. The court will want to see that there is practical application to the parties' dispute in granting the declarations sought. It will want to avoid, for example, granting a declaration which simply repeats the wording of a clause in a standard form of contract. A party seeking a declaration as to whether a particular clause in a contract contains, for example, a condition precedent or what a clause means would be well advised to also set out in the declaration what the practical effect of such a declaration would be.

By way of example, if a contract included an amended clause which contained a condition precedent regarding timely notice requirements for any claims for loss and/or expense, it would be prudent to set out in the declaration what the effect of the court granting that declaration would be. This might have the effect of imposing a time-bar on specific, identified, heads of the defendant's claims, thereby losing their entitlement to recover those losses. Such losses could be significant in the scale of the overall dispute between the parties, which, in turn, might increase the prospects of the parties reaching a commercial settlement with savings both in terms of management time and legal costs.

In terms of procedure, the claimant is required to file any written evidence on which it intends to rely at the same time as filing their claim form and it must be served on the defendant with the claim form. The written evidence is usually (but not always) in the form of a witness statement. The defendant must then file and serve an acknowledgement of service and evidence on the claimant within 14 days. In certain circumstances, this can be extended by 14 days and the claimant can also be afforded an opportunity to reply to the defendant's written evidence. The court will then hear the application or, in some cases, proceed without a hearing.

Conclusions

If you are considering bringing a Part 8 claim:

1. Will your declaration(s) involve a substantial dispute of fact? If the answer is yes, the Part 8 procedure is not appropriate.
2. Ensure that the declaration(s) is drafted in clear terms and that it would have practical application to the parties' dispute.
3. Follow the procedure set out in Part 8. ■

1. [2018] EWHC 2043 (TCC)
2. [2019] EWHC 3482 (TCC)
3. [2023] EWHC 2152 (TCC)
4. [2017] EWHC 2450 (TCC)
5. *North Midland Construction Plc v AE & E Lentjes UK Ltd* [2009] EWHC 1371 (TCC)
6. *Dalkia Energy and Technical Services Ltd v Bell Group UK Ltd* [2009] EWHC 73 (TCC)
7. *Sudlows Ltd v Global Switch Estates 1 Ltd* [2022] EWHC 3319 (TCC)
8. [2019] EWHC 1591 (TCC)
9. [2017] EWHC 517 (TCC)
10. *Rochford Construction Ltd v Kilhan Construction Ltd* [2020] EWHC 1947 (TCC)

Statutory demands: a reminder of the risks

In the current financial climate, getting paid can be increasingly difficult, to say the least. Consequently, parties sometimes resort to serving statutory demands or winding-up petitions as a means of debt recovery, seeking to put pressure on those who do not pay. This is a strategy that should only be embarked upon with care and caution. Partner **Edward Farren** has for many years regularly advised clients faced with statutory demands and/or petitions, or those who might be looking for ways to bring about swift payment of debts, and details such an instance from July 2023.

The draconian result of advertising the existence of a winding-up petition, which will lead to the freezing of bank account and more, means that, when challenged, the courts will not allow petitions to proceed where there is a genuine bona fide dispute. In these cases, the courts are swift to award indemnity costs against those who threaten and/or issue the petition. Conversely, the courts are alive to those seeking to avoid having to pay raising smokescreens or clouds of objections designed to wrongly suggest that a dispute exists.

Given the seriousness of any such action, company directors should always take prompt action when faced with threats of statutory demands or winding-up petitions. In July, we successfully acted for a company faced with a situation where although a statutory demand had been served, the party behind the demand refused to withdraw it. This left our client with no alternative but to take action to restrain that party from taking any further steps by way of injunctive proceedings.

The case, which is reported as *A Company v Respondent (Re Injunction to Restrain Presentation of a Petition and Insolvency Act 1986)*[1] came before ICC Judge Barber.

We were asked to represent our client who provided electrical services ("C") and in doing so, sought an injunction restraining a labour agency ("R") from presenting a winding-up petition against them, based on sums claimed in their statutory demand.

The parties had been working on projects and R agreed to provide a number of labour operatives. There was a dispute as to the terms of that agreement. C said that R agreed to:

(i) source labour from their database of electrically qualified persons;

(ii) provide defined categories of operative with specific minimum qualifications for each category; and

(iii) verify and validate qualifications held by each operative put forward.

The projects did not run smoothly and disputes arose, with R demanding payment of sums invoiced. R served a statutory demand and refused to withdraw it and in doing so, confirmed their intention to present a winding-up petition unless the sums demanded were paid. C said that there appeared to be discrepancies between the hours claimed, plus concerns over the qualifications of R's operatives. The main contractor had suggested that adjustments in respect of 180-days of snagging works might be needed. C said they would carry out an audit. C wrote to R, saying that:

> *"If you do pursue your submission of a statutory demand, we will instruct our solicitors to submit to the court an injunction against [the Respondent] in the matter, as we have identified the monies to be in dispute given the difference in value of our accounts directly which may be considered fraudulent. We note and identify that due to the values being deducted from our account being a direct relation to the personnel provided by [R] we will be suspending any payments owed to [R] until this matter can be resolved and a true value of the account be identified".*

R did not reply, and the dispute remained. In February 2023, R served a statutory demand.

A statutory demand is a formal written demand for payment of a debt within 21 days. If payment is not made or if a company fails to apply to restrain the creditor from presenting a winding-up petition, the creditor can use the statutory demand as grounds to present a petition to the court for a winding-up order. The failure to respond to the demand is evidence that there is both a genuine debt and that the company does not have means to pay.

The following day, C wrote saying that the entire sum had been in dispute for over six months and warned that if R sought to act on the statutory demand, C would have no option but to seek an injunction restraining presentation. The letter required confirmation within seven days that R would not act on the statutory demand and that it would be withdrawn. There was no reply; four days later, C sent a further letter setting out its position in detail. The letter addressed material discrepancies in hours claimed and concerns regarding the qualifications of the operatives supplied, which may have led to defective works.

R again failed to reply. C wrote again seeking urgent confirmation within 24 hours that the statutory demand would be withdrawn and warning that, in the absence of such confirmation, an application for an injunction restraining presentation would be made. As there was no reply, we sent a further letter to R explaining that the presentation of a winding-up petition in relation to a debt that was the subject of a bona fide dispute was an abuse of process.

There was still no reply and C also tried to speak at a director level to R. As there was no response, C sought and obtained an interim injunction restraining R from presenting a winding-up petition against C in respect of the debts claimed in the statutory demand until further order.

By the time of the hearing before ICC Judge Barber, although the positions had narrowed, R said that even if everything C had said was true, R was still owed some £17,000. C had also raised a cross-claim "*for the losses and damages associated with [R's] operatives' under-qualification*".

The judge noted the following legal principles:

(i) The court will grant an injunction to restrain presentation of a winding-up petition where it considers that the petition would be an abuse of process and/or that the petition is bound to fail.

(ii) The court will restrain a company from presenting a winding-up petition if the company disputes, on substantial grounds, the existence of the debts on which the petition is based.

(iii) The court will also restrain a company from presenting a winding-up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: Even if not qualifying as a set off, a genuine and substantial cross-claim exceeding the would-be petitioner's claim will also result in the petition being dismissed in exceptional circumstances (as a discretionary matter).

(iv) Further, it is an abuse of process to present a winding up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed.

(v) However, this does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The court must be persuaded that there is substance in the dispute.

The judge referred to the case of *LDX International Group LLP v Misra Ventures Ltd* [2018] EWCA Civ 3030 where the judge said:

> *"It is incumbent on the recipient of the statutory demand to demonstrate, with evidence, that the cross-claim is genuine and serious… Bare assertions will not suffice: there is a minimum evidential threshold".*

The judge allowed the cross-claim to be considered. R had had the opportunity to file evidence in reply and it was not the case there that the cross-claim was put forward in bad faith, as a pretext to stave off winding up proceedings. Whilst initially, the evidence in support of the application to restrain presentation focused on the issue of overcharging, it was not the case that the first time that any cross-claim was intimated was by C's reply evidence and it was only on the filing and service of R's first witness statement in March 2023 that the requested evidence of the qualifications held by R's operatives was provided.

The judge was of the view that the facts and matters now relied upon by C in support of its cross-claim did clear the minimum evidential threshold. There was a genuine, strongly arguable cross-claim in contract/misrepresentation which had real prospects of success.

The evidence established a strongly arguable case that approximately 40% of the operatives supplied were materially underqualified and the electrical works undertaken were *"peppered with defects which then had to be corrected".* The judge also took into account the long-standing reluctance of R to disclose evidence of the qualifications held by the operatives notwithstanding repeated requests. That conduct strongly suggested that R was aware that these qualifications mattered, in context.

As to quantum of the cross-claim, R were able to link the contra charges for each defective element of work to a room in which an operative from R was responsible. This led the Judge to conclude that all but £17,000 of the sum claimed by the statutory demand was the subject of a bona fide dispute on substantial grounds; and that C had demonstrated a genuine, strongly arguable cross-claim in contract/misrepresentation comfortably exceeding £17,000 with real prospects of success.

Conclusions

Where there is a genuine dispute about all the sums claimed in the statutory demand or winding-up petition, the court will not hesitate to restrain the claiming party from taking any further steps. The court is also likely to order that indemnity costs are payable. In *Re a Company* [1992] 1 W.L.R. 351, the judge said:

> *"I think that it should be made clear that abuse of the petition procedure in these circumstances is a high risk strategy, and consequently I think the appropriate order is that the petitioner should pay the company's costs on an indemnity basis".*

If a party is refusing to pay, before considering winding-up or similar routes to recovery, be certain that the debt is not disputed and always be ready to consider alternative approaches. Positions change, and during insolvency proceedings they can change rapidly. If a statutory demand is served on you, make clear immediately the grounds on which it is disputed, including documentary evidence if you can. If part of the debt claimed is truly owed, try and pay. And whatever your position, do something: take advice, reply to any correspondence you may receive as promptly as you can. Silence and/or long delays in responding are only likely to exacerbate the situation. ■

1. [2023] EWHC 1779 (Ch). Given the potential consequences of these claims, where a party succeeds in preventing the presentation of a petition, the names of the companies involved are typically anonymised.

A Closer Look at the Building Safety Act

Higher-risk buildings regulations: surviving the new regime[1]

On 1 October 2023, a new building control regime was brought into force for higher-risk buildings with the promulgation of the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (the "Regulations") and the Building Regulations etc (Amendment) (England Regulations 2023). The Regulations implement Part 3 of the Building Safety Act 2022 ("BSA").

A number of significant changes have been brought about as a result of the new Regulations. In particular, the Regulations instituted new obligations for dutyholders, a new "Gateway regime", a new change management regime[2] and the requirement to generate and store a "golden thread" of information.[3] **Ben Smith** and **Samantha Jones** from 39 Essex Chambers explain further.

The aim of the new regime in the post-Grenfell landscape is to ensure that building safety risks in higher-risk buildings are considered at each stage of a building's design and construction and introduces a step change in the way the construction industry delivers projects and their longer-term management.

Unsurprisingly, the new regime brings with it a number of challenges and risks. This article explores the challenges and risks and suggests strategies for managing them.

Applicability

Gateways

The new Gateway regime applies to buildings that meet the height requirement and the higher-risk building work ("HRB work") definition.

As you may be aware, a building is a higher-risk building if it is at least 18 metres in height or has at least seven storeys and contains at least two residential units or a building that is a care home or a hospital that meets the same height requirement.[4] The Government has recently announced that military barracks will also be included within the definition of a higher-risk building through an amendment to the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 introduced in the Higher-Risk Buildings (Keeping and Provision of Information etc) (England) Regulations (albeit there is currently no timescale for this change, or any suggested transitional provisions).

The new regime only applies to those buildings undergoing HRB work, namely a new construction of a higher-risk building, work to an existing building that causes it to become a higher-risk building (such as adding storeys to a building that was previously below 18 metres), or a building that undergoes a material change of use such that it becomes a higher-risk building (for example, the conversion of an 18-metre office block to residential accommodation). The regime does not otherwise apply to existing higher-risk buildings.

Dutyholders

In contrast, the new dutyholder provisions, which were brought into effect by the Building Regulations etc (Amendment) (England Regulations 2023), apply to all building works, not just HRB work. The new dutyholder regime is intended to improve accountability throughout the life cycle of a project and defines new dutyholders as the client, principal designer, other designers, principal contractor and other contractors.

Transitional provisions

The new regime is subject to certain transitional provisions. The transitional provisions provide that, if before 1 October 2023:

- the initial notice has been given to a local authority **and** accepted; or
- full plans have been deposited with a local authority;

  and

- for new higher-risk buildings, works are "*sufficiently progressed*" before 6 April 2024. Works are "*sufficiently progressed*" when the pouring of concrete for the permanent placement of trench, pad or raft foundations or the permanent placement of piling has started; and

- for work to existing buildings, the work has started before 6 April 2024.

If the transitional provisions are met, then Parts 2 to 6 of the Regulations, which include the provisions relating to Gateways, change control, golden thread, etc., do not apply to the building works.

Dutyholders

The duties on the various dutyholders include the following:

The client:

- must make suitable arrangements for planning, managing and monitoring a project (including allocation of sufficient time and other resources) so as to ensure the design and construction of the building complies with all relevant requirements; and
- must also enable the designers and contractors to cooperate with each other and provide for a periodic review of the building work.

The principal contractor should:

- take responsibility for the site;
- make arrangements to monitor the building work (with records) to ensure that the work complies all relevant requirements of the Building Regulations;
- ensure that all working on the project cooperate, communicate and coordinate works with the other dutyholders; and
- manage flow of information to make sure correct recipients receive appropriate information.

The principal designer:

- must not start work unless satisfied the client is aware of their duties for the building works to be carried out;
- should continually monitor competencies to ensure they maintain required competence for the specific project;
- should plan, manage and monitor the design works during the design phase;
- should cooperate with the client, principal contractor and others; and
- should make arrangements to monitor the building work (with records) to ensure that the design, if built, would comply with all relevant requirements of the Building Regulations.

The client, principal designer and principal contractor can be the same individual/organisation, subject to having appropriate competency requirements.

The new dutyholder provisions aim to ensure the parties have the relevant competencies to understand and carry out their roles and adopt a cooperative approach to achieving compliance with Building Regulations. This is part of the wider shift towards parties (dutyholders) being responsible for compliance with the Building Regulations, rather than reliance on approved inspectors.

> ***This is part of the wider shift towards parties (dutyholders) being responsible for compliance with the Building Regulations, rather than reliance on approved inspectors.***

The new Gateways

Gateway 2

Gateway 2 replaces the "*deposit of plans*" stage of the building control process. Under the new Gateway, before any person starts HRB work or a stage of HRB work, the client must submit an application for building control approval to the Building Safety Regulator ("the Regulator").[5] Gateway 2 is a hard stop in that construction cannot begin until three conditions are met:

1. The Regulator has granted building control approval for the work;
2. Any requirements specified by the Regulator are fulfilled; and
3. The Regulator has been notified of the start date of the works.[6]

Regulation 4 (for new higher-risk buildings) and regulation 12 (for existing higher-risk buildings) specify a long list of information that must be included in the application. The client must give notice to the Regulator of their intention to start work with the start date at least five working days in advance.[7]

In terms of timescales and the process for reaching its decision, for new higher-risk buildings, the Regulator has 12 weeks from the date of receipt of a valid application to make a decision, although the timeframe can be extended if agreed in writing between the Regulator and the applicant.[8] For existing higher-risk buildings, the Regulator has eight weeks to make a decision.[9] In reality, given Gateway 2 is a hard stop to construction works commencing, if the Regulator needs more time the parties will have no choice but to agree to it.

In reaching its decision, the Regulator is required to consult with the enforcing authority for the proposed higher-risk building and, where the project includes provision for drainage and waste disposal (under H4 of Schedule 1 of the 2010 Building Regulations), the sewerage undertaker.[10]

The Regulator must grant the application unless the application was not valid in that it did not include all of the information specified by regulation 4, was not sufficiently detailed such that the Regulator could not determine if the work would contravene the building regulations and/or the application shows that the work would contravene applicable requirements of the building regulations.[11]

Gateway 3

The purpose of Gateway 3 is for the Regulator to assess the as-built building and whether the work has been carried out in accordance with Building Regulations. It is also to ensure that no part of a higher-risk building is occupied before it is safe. Accordingly, Gateway 3 operates as another hard stop as the building cannot be occupied or registered with the Regulator until the Regulator has granted the completion certificate.

In terms of demonstrating compliance with Gateway 3, once HRB work or a stage of HRB work on a higher-risk building has been completed, an application must be made in writing to the Regulator for a completion certificate.[12] However, while Gateway 3 replaces the completion phase that existed in the former building control regime, unhelpfully, there is no definition of the meaning of the phrase "completed" in the Regulations. It is anticipated that the Regulator or the Government will issue guidance, but currently this remains unclear.

The requirements for the application are set out in regulation 40 of the Regulations. Significantly, the regulation requires that the client signs and submits a statement confirming that, to the best of their knowledge, the higher-risk building as-built complies with all applicable requirements of the Building Regulations.[13] It also requires the client and the "relevant person", for example, the principal designer and/or principal contractor, to sign a statement confirming that they have provided the information prescribed by regulation 38 of the Regulations, namely the "BFLO information" and the "golden thread information".[14]

Further, the principal contractor or the principal designer is required to submit and sign a compliance declaration confirming that they have fulfilled their duties under Part 2A of the Building Regulations.[15] This is significant for two reasons: (i) it signifies a clear shift from approved inspectors determining compliance with the Building Regulations (the old regime) to the parties being required to understand their roles, act in compliance with the Building Regulations and self-certify; and (ii) if the parties give misleading information to the Regulator by signing the relevant statement/certificate the sanction includes a prison sentence with a maximum term of two years' imprisonment and/or a fine.[16]

In terms of timescales and the process for reaching its decision, the Regulator has eight weeks (or longer as agreed in writing) to determine an application and, within that time, they must inspect the building and give the enforcing authority and, where relevant, the sewerage undertaker, 15 working days to consider the application.[17] In reality, given Gateway 3 is a hard stop to occupation of the building, if the Regulator needs more time, the parties will have no choice but to agree to it.

The Regulator must approve a completion certificate application where it is satisfied, after taking all reasonable steps, that the HRB work complied with the Building Regulations, the required documents have been submitted and information specified by regulation 38 is complete and has been provided.[18]

What happens if the Regulator gets it wrong (Right of Review and Appeal)?

For both Gateway 2 and 3 applications, the Regulator must give reasons if it rejects the application.[19] There is a right of review of the Regulator's decision to reject the application.[20] The applicant must give notice under section 25(2) of the BSA to the Regulator in writing and has 21 days to make an application, which begins on the day after the day on which the decision was notified to the applicant.[21] An applicant can only appeal a decision once the decision has been reviewed provided that the appeal is made within 21 days after the day on which the regulator notified the applicant of its review decision.[22]

Insights and strategies

It is helpful that 17 months after the BSA has been in force, the Government has finally set out the detail of the new building control regime for HRB work to higher-risk buildings. The new regime certainly increases regulatory oversight of these residential buildings, but it remains to be seen how the regulations will play out in practice. In terms of managing the resultant risks and challenges, we suggest parties consider the following:

- Review the new regulations with the design/construction teams and consider the potential implications on the time, cost, and organisation levels for a typical project and how these might be programmed and costed when tendering for new projects.
- Review your current contract drafting and consider if it adequately addresses the potential risks associated with Gateways 2 and 3 and the dutyholder provisions, for example:
  - Delays by the Regulator in approving applications at Gateway 2 and Gateway 3;
  - Liability for delays by the Regulator if, for example, this is due to a deficiency in the application; and
  - Management of change.
- Review your supply chain contracts and consider if they are back-to-back as far as possible to ensure risks are flowed down where appropriate.
- Consider having a discussion with your PI insurer regarding the steps you are taking to comply with the new regime as this may (positively) affect the risk profile of your business. ■

1. A shorter version of this article originally appeared in *The Law Society Gazette* on 24 November 2023.
2. See "The Building Safety Regulator and its role in the higher-risk building regime" by Huw Wilkins at pages 30-31.
3. See The Building (Higher Risk Buildings Procedures) (England) Regulations 2023. A detailed discussion of the Golden Thread requirements is outside the scope of this article.
4. Section 120D of Building Act 1984 read with Regulation 2 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023.
5. See regulations 3 to 7 of the Regulations for new higher-risk buildings and regulations 10 to 17 for existing higher-risk buildings.
6. Regulation 3 of the Regulations.
7. Regulation 9 of the Regulations. The client must also give notice to the Regulator not more than 5 working days after the day on which the HRB work is to be regarded as commenced (regulation 9(3) of the Regulations).
8. Regulation 5 of the Regulations.
9. Regulation 13 of the Regulations.
10. Regulation 6 and 14 of the Regulations.
11. Regulation 7 and 15 of the Regulations.
12. Regulation 40 of the Regulations.
13. Regulation 40(1)(e) of the Regulations.
14. Regulation 40(1)(f) of the Regulations.
15. Regulation 40(5) of the Regulations.
16. Sections 76 and 77 of the Building Safety Act.
17. Regulations 41 to 43 of the Regulations.
18. Regulation 44 of the Regulations.
19. Regulation 7(5) and 15(5) of the Regulations.
20. Section 25 of the Building Safety Act 2022 and regulation 48 of the Regulations.
21. Ibid.
22. Section 26 of the Building Safety Act 2022 and section 49 of the Regulations.

The Building Safety Regulator and its role in the higher-risk building regime

The Building Safety Act 2022 ("BSA") came into force in April 2022, ushering in a new regulatory regime for building safety in the wake of the Grenfell Fire. In this article, **Huw Wilkins** looks at two core elements of that new regulatory regime: the new Building Safety Regulator (the "Regulator"), and its role in the design and construction of higher-risk buildings.

The Building Safety Regulator

A key recommendation of Dame Judith Hackitt's 2018 review of the building industry was the creation of a new national regulator, tasked with promoting and enforcing safety in the built environment. That recommendation has become a cornerstone of the BSA.

The BSA names the Health and Safety Executive ("HSE") as the new Regulator,[1] although the government is looking at the possibility of replacing the HSE as the regulator for high-rise residential buildings with a new body, should the Grenfell Inquiry recommend sweeping reform.[2]

Under the BSA, the Regulator has three main functions:

1. Overseeing the safety and standards of all buildings;
2. Helping and encouraging the built environment industry and building control professionals to improve their competence; and
3. Leading the implementation of the new regulatory framework for higher-risk buildings.

This article focuses on the last of those functions and considers the Regulator's role in approving design and construction work and its powers of enforcement in the event that a party does not comply with the new regime.

Higher-risk buildings

Part 3 of the BSA defines higher-risk buildings as those which are at least 18 metres in height, or with at least seven storeys, and which contain two or more dwellings.[3] The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 extend that definition by providing that care homes and hospitals also fall within the definition of higher-risk buildings (if they meet the height/number of storeys requirements in the BSA).

For higher-risk buildings, the new Regulator alone will enforce the provisions of the BSA and any regulations thereunder.

The higher-risk building regime

All higher-risk buildings will be subject to Part 3 of the BSA, which imposes new obligations in respect of the design, construction and refurbishment of those buildings. In August 2023, the Government published the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (the "HRB Regulatory Regulations") which implement Part 3 of the BSA.

The HRB Regulatory Regulations set out the details of the building control regime for higher-risk buildings, specifying the procedural building regulation requirements when a new higher-risk building is being designed and constructed or when building work is being done to an existing higher-risk building. The new regime came into force on 1 October 2023, although there is a transitional period between October 2023 and April 2024.[4]

The Regulator's approval role

The Regulator will be involved throughout the design and construction of a new higher-risk building, or when work is being done to an existing higher-risk building (or, indeed, if work is being done to an existing building, following the completion of which that building will fall within the definition of a higher-risk building):

- The Regulator is required to approve applications before work starts (known as Gateway 2) within 12 weeks of receiving a ***valid*** application.[5]
- The Regulator can require a client to notify it when a specified point of the work has been reached and not to cover up specified work for a specified period.[6]
- Certain changes must be notified to the Regulator before works start ("notifiable changes") whilst the most significant changes ("major changes") must be approved by the Regulator before works can start. The Regulator has six weeks from receiving a ***valid*** application for building control approval to approve a major change.[7] Where the Regulator does not respond within the requisite time (as may be extended by written agreement), the Regulations do not provide for approval by default, meaning that a contractor will have to wait until it obtains the Regulator's approval before it is able to start works in respect of the major change.
- Where, during the construction phase, (i) an aspect of the design relating to the structural integrity or fire safety of a higher-risk building would give rise to a risk of a significant number of deaths, or serious injury to a significant number of people; or (ii) an incident or situation relating to the structural integrity or fire safety of a higher-risk building occurs that would be likely to present a risk of a significant number of deaths, or serious injury to a significant number of people; then a principal dutyholder must, on becoming aware of the occurrence,

1. See section 2.
2. See amendment after clause 214 of the Levelling-up and Regeneration Bill which empowers the Secretary of State to do so.
3. Note that a slightly different definition of "higher-risk buildings" applies for the purposes of the "in-occupation" provisions in Part 4 of the Building Safety Act. For example, hospitals and care homes will not be required to meet the requirements of the "in-occupation" obligations.
4. The provisions relating to the transition period are set out in Schedule 3 of the HRB Regulatory Regulations.
5. Regulation 3-7 (for work on new higher-risk buildings) and Regulations 11-15 (for work on existing higher-risk buildings).
6. Regulation 8 (for work on new higher-risk buildings) and Regulations 16 (for work on existing higher-risk buildings).
7. Regulation 18.
8. Regulation 46.

notify the Regulator of the safety occurrence by the quickest practicable means without undue delay and then provide a written report to the Regulator within 10 days.

- Issue a completion certificate in respect of work to a higher-risk building (known as Gateway 3) within eight weeks of receiving a ***valid*** completion certificate application.

Parties will need to grapple with the Regulator's role in approving work at the various stages for design and construction. It will be imperative for parties to identify who will make the requisite applications to the Regulator and to deal with the risk of the Regulator's actions (or inaction) holding up the design and/or construction process.

The Regulator's enforcement role

In addition to its role in approving works, in relation to any building or proposed building for which the Regulator is the building control authority, the Regulator may take such steps as it considers appropriate to check compliance with all applicable requirements of the building regulations, including:[8]

(a) Requiring information;

(b) Requiring the laying open of building work for inspection by the Regulator; and

(c) Requiring an inspection to be undertaken and the record of the inspection provided.

There are also two forms of notice available to the Regulator:

Compliance Notices: If the Regulator considers that a person appears to have contravened, be contravening or be likely to contravene building regulations, they can issue a Compliance Notice which effectively requires the recipient to take specified steps within a specified period (to ensure compliance).

Stop Notices: These prohibit, either immediately or from a specified time, the carrying out of specified work. They can be issued to a person who appears to be in control of any work if it appears that it:

- contravenes specific building regulations;
- contravenes a Compliance Notice; or
- contravenes a building regulation which can cause serious harm – meaning that there is a risk of serious harm to people in or around the building if the contravention is not corrected.

A person who, without reasonable excuse, contravenes these notices commits a criminal offence, punishable by and fine and/or up to two years in prison.

The HSE has stated that it intends the Regulator to deliver evidence-based, proportionate, and targeted engagement and interventions with dutyholders. The HSE will publish an Enforcement Policy Statement which will set out the key enforcement principles in respect of the Regulator's enforcement powers, regulatory tools and sanctions, and how they will be applied. Those principles are:

- **Proportionality** in how the Regulator applies the law and secures compliance;
- **Targeting** of enforcement action;
- **Consistency** of the Regulator's enforcement approach;
- **Transparency** about how the Regulator operates and what stakeholders can expect; and
- **Accountability** for its actions.

Given the enforcement powers available to the Regulator, all those working on higher-risk buildings will be interested to see how the Regulator intends to exercise those powers.

Conclusion

The BSA came into force in April 2022. It took almost 16 months to publish the Regulations setting out the new regime for higher-risk buildings and the transitional period comes to an end in April 2024. There is comparatively little time for those within the industry to get to grips with the Regulations. However, these are an important set of Regulations with potentially significant consequences – both in terms of potential contractual liability (for example, in terms of risk of delay arising from the approval process) and regulatory sanctions (including fines and/or custodial sentences). ■

Feeling the force: the impact of the BSA on downstream claims

The Government's post-Grenfell mission to affect root and branch reform of the regulation of buildings, particularly high-risk buildings, has resulted in the Building Safety Act 2022 ("BSA"). The underlying purposes being to ensure that:

- safety is paramount when designing, constructing, and maintaining buildings; and
- those who have developed and worked on the defective buildings foot the bill for their repair, instead of the leaseholders or taxpayers.

Everyone is talking about what the BSA says – the specific words and the mechanics of the new safety regime – but as **Lucinda Robinson** discusses further, the long arm of this law extends even further than that to achieve these purposes.

One of the best illustrations of the long arm of the law is the Developer Remediation Contract ("DRC"), which has been facilitated by the BSA. The name tells us that the DRC is directed at developers, but it also increases the risk of claims against others in the supply chain as explained below. Furthermore, recent cases decided when the BSA was on the horizon, or just in force, reveal that the environment in which those claims will be tried may be harsher than before. The key three cases, and their ramifications for the supply chain in light of the DRC, are considered below.

The Developer Remediation Contract

The Government can now establish *"building industry schemes"* to secure the safety of people in or about, and deal with risks arising from or improve the standard of buildings (BSA, s.126). Each scheme will be set up by regulations covering membership criteria. Eligible organisations who decide not to join will be blocked from developing land or proceeding with existing developments.

The Responsible Actors Scheme, targeting developers, is the first scheme out of the blocks. Broadly, developers are eligible if they meet profit thresholds and developed or refurbished qualifying residential buildings. Members must sign the DRC, obliging them to:

- identify any residential buildings 11 metres or higher that they developed or refurbished over the 30 years before the BSA and known to have life-critical fire safety defects;
- remediate any identified defects, fund their remediation or reimburse the government schemes for taxpayer-funded remediation; and
- keep building owners, residents and the Department for Levelling Up, Housing and Communities updated on progress.

Eligible developers choosing not to participate will be blocked from developing land. In effect, they will be taken out of the market. It is a strong incentive to sign up and many major developers have joined the scheme.

The story will not end there. The DRC's terms expressly permit the developers to pursue claims against their supply chain to recover the costs of the remediation works. It is likely they will take that opportunity increasing the volume of claims against contractors, subcontractors, and professionals. For ease, the passages below refer to contractors, but the principles apply to all members of the supply chain.

Claims against the supply chain

There is an important difference between the position of developer under the DRC and a contractor in an ensuing claim. Developers must act regardless of whether they had been negligent or breached any contract or duty. The same is not true for contractors who can defend themselves on grounds they did not breach a duty or cause loss, at least to the extent claimed.

Contractors may take some comfort from this. However, the following three cases, decided with the BSA either on the horizon or in force, demonstrate a commitment from the courts to support the purpose behind the BSA and apply its provisions robustly. This means the landscape in which those claims will be tried may be more hostile towards defendants than they may have hoped.

Martlet Homes Ltd v Mullaley & Co Ltd [2022] EWHC 1813 (TCC)

The developer, Martlet, replaced the cladding systems on five tower blocks and claimed the costs from its contractor, Mullaley. Martlet argued replacement was necessary because the cladding contained combustible insulation in breach of specification and because there were defects in the installation of both the insulation and fire breaks. Mullaley denied liability.

In its decision, the court found against Mullaley on a number of arguments commonly deployed in defence of contractors in defect claims.

1. Causation

Contractors also often argue that the breach alleged against them did not cause the loss. Here, for example, Mullaley argued that the real reason Martlet replaced the cladding was the "*changed fire-safety landscape*" post-Grenfell.

In contractual claims, the alleged cause must be the "effective" cause of the loss; i.e., in practical terms, the most impactful. The court decided that Mullaley's breaches were ***an*** effective cause of the loss. That begs the question: if there is more than one cause, how "effective" must the contractor's breach be in order to be legally responsible? In the context of fire safety, where the overriding concern is that buildings should be made safe and where the mantra is that polluters should pay, whilst the contractor's cause needs to be effective, it may not need to be the ***only*** or even the ***most*** effective one to carry responsibility for the loss.

2. Repair or replacement

When defending quantum, contractors typically argue (as Mullaley did) that the defective works should have been repaired rather than replaced because it would have saved costs. Here, the court upheld Martlet's decision to replace the cladding system. Whilst the installation defects could have been repaired, the failure to comply with the specification justified full replacement.

3. Assessing loss

Quantum is usually the last line of a defendant contractor's defence. If it cannot defeat allegations of breach and causation, then all it can do is challenge the numbers.

Mullaley argued the loss claimed was unreasonable, but Martlet was largely given the benefit of the doubt. The court determined that "reasonable" does not equate to adopting the cheapest option. Claimants seeking to do the right thing by remediating buildings to keep people safe, particularly when those works were necessitated by another party's breach of duty/contract or when the claimant is working with incomplete information and has taken expert advice, will not be criticised. It is becoming harder for defendant contractors to challenge quantum for being unreasonable.

Taking all of this together, in its first opportunity to set the tone for fire safety cases, the court indicated the new environment would be difficult for defendants.

***LDC (Portfolio One) Ltd v (1) George Downing Construction Ltd; (2) European Sheeting Ltd (in liquidation)* [2022] EWHC 3356 (TCC)**

This second case reiterated the same messages.

LDC developed three tall tower blocks of student accommodation. Under the main contract, the contractor, Downing, had committed to comply with "*all Statutory Requirements*". ESL, the specialist cladding subcontractor, agreed not to put Downing in breach of the main contract and backed this up with an indemnity.

Later, LDC claimed £21 million of loss from Downing, arising from replacing the cladding and fixing other defects in the external walls. Two weeks before trial, LDC and Downing settled at circa £17.7 million. Downing then sought to rely on the indemnity to recover the settlement sum and its own costs from ESL.

ESL argued that it was only subject to a reasonable skill and care obligation, and that the remedial works were unreasonable and/or constituted betterment to LDC. The court disagreed on all fronts, finding:

1. ESL was obliged to comply with the main contract so, like Downing, had a strict obligation to comply with the Building Regulations. Diluting this obligation with a reasonable skill and care qualification would defeat the intention to create back-to-back contracts.

2. When assessing reasonableness of remedial works costs, the starting point is the sum actually incurred. If the claimant acted urgently on incomplete information whilst following expert advice, it will not be penalised. The defendant cannot just point to a cheaper scheme; it must show that the claimant's scheme was unreasonable, considering cost and use.

3. A deduction for betterment will not usually be made where the claimant has no choice but to repair or reinstate to a higher standard because regulations have changed.

4. When considering if a settlement is reasonable, the court will consider if it "*was, in all the circumstances, within the range of settlements which reasonable people in the position of the settling party might have made*". Here, the settlement between LDC and Downing was reasonable and could be passed on to ESL because it reflected the experts' views on the costs of remedial works, was agreed following legal advice, and avoided costs of a trial.

ESL, being in liquidation, was not represented at the trial, but, even if it was, the judgment may have been the same given how consistent it is with *Martlet v Mulalley* and the new building safety culture. The overriding impression is that those responsible for building safety defects will be held to account.

***URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772**

Th first case to grapple with BSA claims has continued the trend.

BDW developed two residential tower block developments: one in London which completed by February 2008 and was sold by December 2008, and one in Leicester which completed by October 2012 and was sold by May 2015.

Post-Grenfell, in 2019, BDW inspected both towers and identified structural defects endangering safety even though there was no physical damage. Despite no longer having any proprietary interest in the towers or facing any legal claims, BDW spent millions of pounds evacuating tenants and remediating the towers. Then, in March 2020, it brought a professional negligence claim against the structural engineer, URS, to recover its loss.

When the BSA came into force in April/June 2022, it extended limitation periods for claims under the Defective Premises Act 1972 ("DPA"). BDW took advantage of this and sought to amend its Particulars of Claim to add in claims under the DPA (previously limitation barred) and the Contribution Act 1978 ("CA"). The Court of Appeal upheld the first instance decision allowing the amendments, making the following points:

1. *The BSA did apply.*

URS argued that the BSA did not apply to existing claims, so the DPA claim remained time barred, and the amendment should not be permitted. The Court of Appeal disagreed, relying on the wording of s.135(3) of the BSA which says the amendment to the DPA to extend limitation periods should be treated as always having been in force. The only exception, provided for in s.135(6), was for claims already settled or decided before the BSA took effect. The exception did not cover ongoing claims, so the BSA applied and BDW's amendments were allowed.

2. *The tortious duty of care was not time barred.*

URS owed BDW a duty of care to protect against structural defects needing remediation. Not, as URS had argued, to protect BDW from claims by purchasers, the risk of which had passed once the towers were sold. Consequently, the risk that materialised was within URS's duty of care.

The cause of action accrued, at the latest, on practical completion of the building works when the defective design had been built into the structure. Not later when defects were discovered in 2019. URS had argued for the later date when BDW no longer owned the properties, because URS said that, if BDW had no interest in the properties, it could not bring a DPA claim.

3. *The duty under the DPA can be owed by and to developers.*

Under the DPA, a person taking on work in connection with the provision of a dwelling owes a duty to carry out those works in a workmanlike or professional manner, so that, on completion, the dwelling is fit for purpose. This duty is owed to those with a legal or equitable interest in the dwelling, e.g., individual tenants (s.1(1)(b)) and also to those to whose order the work is carried out (s.1(1)(a)), which must include developers.

4. *Contribution claims are not dependent on the third-party claims being made.*

URS argued that there could be no contribution claim because no claims had been made by third parties. The Court of Appeal disagreed. The wording in the CA does not make a contribution claim conditional on a claim being established in fact first. The reference in s.1(6) is to "*liability which has been or could be established*". Even though none of the leaseholders had initiated a claim against BDW, they could have done and so BDW was entitled to claim a contribution.

In rejecting all URS's efforts to avoid BDW's amendments, the court delivered a clear message that the BSA and its repercussions for the DPA and CA will be applied, and those responsible for defects must face the music. The judgment provides better news for developers signed up to the DRC, as it provides reassurance that they can rely on the BSA, DPA and CA to bring claims against their supply chains.

> ***The[se] … cases, decided with the BSA either on the horizon or in force, demonstrate a commitment from the courts to support the purpose behind the BSA and apply its provisions robustly.***

Conclusion

Faced with developers looking to recoup their losses for remediating buildings, legislation that gives them huge scope to do so and courts ready to enforce the legislation and the purpose behind it, what can defendants do?

1. Understand their exposure by conducting an audit of their projects dating back over the last 30 years to consider where there may be risk, if there is any insurance cover and whether any relevant documents are available and personnel still contactable.
2. Set up processes for managing claims received, so they are funnelled to the right people to respond, insurers are notified, and other potential defendants are identified.
3. Rely on the BSA, DPA and CA themselves to bring contribution claims against their own supply chains, to either pass on or share liability with others. There may be multiple parties whose actions or inactions contributed to fire safety defects, from specialist cladding contractors to architects and fire engineers.
4. Continue to run the usual defendant arguments concerning causation and loss where the evidence allows, but recognise that the evidential hurdles may be more difficult in practice based on these recent judicial findings.

Fundamentally, those who are responsible for building safety defects will feel the full force of the BSA, whether through the terms of the DRC or through the additional routes to claim over longer periods of time that the BSA affords, and which are becoming increasingly difficult to defend. There is a strong incentive for them to get it right next time. ■

Limitation periods: a timely reminder

In the recent case of *Vinci Construction UK Ltd v (1) Eastwood and Partners (Consulting Engineers) Ltd; (2) Snowden Seamless Floors Ltd v GHW Consulting Engineers Ltd* [2023] EWHC 1899, the TCC considered an application for reverse summary judgment.

In reaching its decision, the court considered the principles set out in the recent Court of Appeal case *URS Corp Ltd v BDW Trading Ltd* [2023] EWCA Civ 772,[1] which determined a key point of law on the question of when a cause of action accrues in negligence for the purposes of limitation. As **Rebecca Penney** sets out, the decision in the *Vinci* case provides some useful guidance on when a cause of action accrues in circumstances where there has been physical damage vs economic loss, as well as some helpful commentary on the application of s.14A of the Limitation Act 1980 (the "Act"). This is particularly relevant to those who are bringing or defending claims against designers of allegedly defective structures.

Background

The claim relates to the design of a defective concrete warehouse slab. Princes Ltd, a well-known manufacturer of bottled drinks, employed Vinci Construction UK Ltd ("Vinci") as its design and build contractor to refurbish and upgrade its warehouse and distribution facility in Bradford.

As part of the contract works, Vinci was required to design and construct a new concrete slab for part of the warehouse known as the Low Bay Warehouse.

Vinci engaged Eastwood and Partners (Consulting Engineers) Ltd ("Eastwood") as its civil and structural engineer, and Snowden Seamless Floors Ltd ("Snowden") to design, supply and install the concrete slabs. Both contracts were executed as deeds with a limitation period of 12 years.

Snowden, in turn, engaged GHW Consulting Engineers Ltd ("GHW") as its specialist slab designer; however, this contract was not executed as a deed and, therefore, the limitation period for the contract with GHW was only six years.

The concrete slab design was carried out in April, May and June 2013. The installation of the floor slab was completed on 9 July 2013 and handed over to Princes in early August 2013. By September 2013, the slab had begun to show signs of cracking and other defects/damage. Various attempts were made to repair the slab during the years that followed; however, none of the repairs were successful. In 2020, Princes made the decision to remove and replace the concrete floor slab in its entirety and, subsequently, brought two successful adjudication proceedings against Vinci, following which the adjudicator decided that Vinci was liable to pay £2.5 million to Princes for the cost of the remedial scheme plus various other ancillary costs.

The application

On 9 February 2022, Vinci (the claimant) issued proceedings in the TCC against Eastwood (the first defendant) and Snowden (the second defendant) in respect of the sums paid pursuant to the adjudication decisions, plus the costs of defending the adjudications. Subsequently, Snowden made a Part 20 claim against GHW (the third party) on 8 April 2022, seeking an indemnity and/or contribution from GHW in respect of the claims brought by Vinci. Prior to that, on 18 January 2021, Snowden had issued a preliminary notice of claim against GHW, and the parties then entered into a standstill agreement on 7 May 2021 suspending time for the purposes of limitation for six months from the date of the agreement until 21 April 2022.

The application for reverse summary judgment was brought by GHW on the basis that Snowden's claims against it had no real prospect of success because:

1. The contractual claims were time barred being more than six years from the date of breach;
2. The negligence claims were time barred under s.2 of the Act being more than six years from the date on which the cause of action accrued; and
3. Any claim for latent defects under s.14A of the Act was also time barred being more than three years since Snowden had the requisite knowledge to bring a claim.

During the submissions, Snowden accepted that its contractual claims were time barred but it opposed the application on the basis that its negligence claims were not time barred under either s.2 or s.14A of the Act.

The Part 20 claim was served before the expiry of the standstill, and so it was agreed that, for limitation purposes, the claim was to be treated as having been issued on 7 May 2021. The central issue for the court to decide was whether Snowden's claims in negligence were already time barred under either s.2 or s.14A of the Act by the time the Part 20 claim was issued on 7 May 2021.

To answer that question, the court had to consider when the cause of action accrued for the purposes of Snowden's claims.

Decision

In reaching her decision, O'Farrell J referred to the recent Court of Appeal decision in *URS v BDW*. This case is perhaps better known in the context of the Building Safety Act; however, the judgment also contains helpful commentary about when the date of accrual of a cause of action in negligence arises against designers of defective buildings in circumstances where the defect caused no immediate physical damage.

O'Farrell J reviewed the legal principles recited in the *URS* decision and concluded that to ascertain when the cause of action accrues under s.2 of the Act, it is important to properly characterise the type of loss suffered. If the loss is characterised as physical damage, the cause of action accrues on the date of the damage. However, if the loss is characterised as economic loss, the cause of action accrues by the date of practical completion of the works.

In this case, Snowden's claims were found to be time barred under s.2 because:

1. In the case of economic loss, the date of completion of the works was more than six years before the claim was issued; and,

2. It was clear on the basis of the evidence before the Court that material physical damage had occurred by March/April 2015 at the latest and this was more than six years before the claim was issued.

The court then went on to consider the operation of s.14A of the Act (this being the only claim of Snowden's that was not time barred). The court confirmed that where s.14A applies, it displaces s.2 and provides for a potentially longer limitation period in respect of latent defects, being three years from the date of the knowledge required to bring a claim for the damage.

The court confirmed that, in this situation, the onus is on the claimant (in this case, Snowden) to prove that it first had the knowledge required for bringing its claim within a period of three years prior to the issue of its claim.[2]

O'Farrell J reviewed the relevant legal principles[3] about the degree of knowledge required:

1. It is not necessary for the claimant to have sufficient knowledge to draft a full claim, but what is required is knowledge of the essence of the act of omission to which the damage can be attributed.

2. It is not enough for the claimant to have knowledge that the acts or omissions constituted negligence; the claimant must also have sufficient knowledge that the damage was attributable to those acts or omissions.

3. Attribution in that context means a real possibility that the damage can be attributed to the negligent act or omission and not a fanciful one.

O'Farrell J decided that, in this case, it was not possible to reach a view on the extent of Snowden's knowledge without conducting a mini trial on the documents and such an approach would be contrary to the principles relevant to the determination of an application for summary judgment. Snowden had a real (rather than a fanciful) chance of succeeding in its claim under s.14A and that the proper forum for determination of those issues would be at trial.

Why does it matter?

This case highlights the importance of ensuring that contracts are "*back-to-back*" in respect of limitation. In other words, if a main contract has been signed as a deed, any subcontract or sub-subcontracts should also be signed as a deed to allow any claims to be passed down the chain and to avoid the situation where a subcontractor has a possible limitation defence to a claim passed down from the employer. It is also prudent to obtain appropriate warranties from any subcontractors or sub-subcontractors and to ensure that these are also executed as deeds where appropriate.

> *It is also prudent to obtain appropriate warranties from any subcontractors or sub-subcontractors and to ensure that these are also executed as deeds where appropriate.*

It also highlights the need for contractors and subcontractors to think about limitation and any potential standstill agreements as soon as possible. As is clear from this case, a claim under s.14A is not necessarily straightforward and it is possible that the parties will have to go to trial to have the issue of limitation determined which only serves to increase the cost involved. ■

1. See Lucinda Robinson's article, "Feeling the force: the impact of the BSA on downstream claims", for more details.

2. Paragraph 57 applying the principles in *Nash v Eli Lilly* [1993] 4 All ER 383 per Purchas LJ at p.396.

3. As summarised in *Howard v Fawcetts* [2006] 1 WLR 682 (HL), per Lord Nicholls.

The reinforced autoclaved aerated concrete crisis: to what extent will claims "RAAC up"?

The announcement by the UK government in late August 2023, days before the start of the new academic year, that over 100 schools would not be able to re-open because their buildings were unsafe brought reinforced autoclaved aerated concrete ("RAAC") into focus in the news.

However, there have been concerns in the structural engineering community about the ongoing durability of this lightweight form of concrete for some time, particularly since the collapse of a ceiling at a primary school in Gravesend in Kent in 2018. The news concerning the failure of RAAC has come at a time when building safety is already under the spotlight following the Grenfell Tower disaster in 2017 and the introduction of the Building Safety Act ("BSA") last year.

In this article, **George Boddy** explores whether the current issues with RAAC may give rise to an increase in claims against those involved in the construction and refurbishment of buildings containing the material.

What is RAAC?

RAAC is a lightweight cementitious material. It is aerated and has no coarse aggregate which means that its structural properties and behaviour are considerably different when compared to traditional reinforced concrete. It has much lower compressive, flexural, shear and tensile strengths than traditional concrete and is far more susceptible to deflection in the long term. The aerated nature of RAAC means that it is very lightweight, contains air bubbles and does not form adequate bond strength with reinforcement as a result.[1] Its appearance when cut through has been likened to the inside of an Aero chocolate bar.

RAAC was used in buildings to form roof planks, wall panels and floor planks between the 1950s and the mid-1990s in the UK. It was a more cost effective and lighter material than traditional concrete and so was quicker and cheaper to install, which made it attractive for public sector buildings, such as schools, court houses, army barracks and hospitals, although it was also used in privately owned buildings.

The Building Research Establishment considers that RAAC has a design life of approximately 30 years. Given when it began to be installed, many buildings will contain RAAC that is well beyond its design life.

What are the problems with RAAC?

There are a number of things that can potentially go wrong with RAAC in the manufacture process, at the time of the original installation or during its service life.

Problems have been identified in RAAC panels caused by their manufacturing process, including the incorrect placement of the internal reinforcement cages within the panel moulds and the number of reinforcement bars contained within them. These issues can impact upon the strength of the panel.

The most common issues associated with the original installation of the RAAC panels are the insufficient bearing of panels on the end of the beam, the absence of sufficient horizontal reinforcement at bearings and the cutting of panels to size during construction to fit them for the chosen application, and the use of inadequate supports for cut panels.

Defects in the RAAC panels can also be caused by subsequent works undertaken to a building containing them. For example, the installation of new services may require builders work holes to be drilled through the panels or fixings to be applied, which can damage the panels and reinforcement inside them and undermine the panel's structural integrity, particularly if insufficient or no additional support is provided.

Other common problems include the corrosion of the reinforcement inside the panel where it has been subject to water ingress or condensation. This is thought to be a particular risk because the corrosion can be well established before there are any obvious external signs of its presence. One of the major concerns with RAAC panels, and the key reason why schools remained closed, is the propensity for a defective panel to collapse without any warning.

Will claims against contractors and construction professionals "RAAC up"?

This is unlikely due to the passage of time since the vast majority of RAAC was installed in buildings. Structural deficiencies in RAAC first became known in the 1990s and, since that time, European Standards have been published to improve standards and to ensure better long-term durability. It is likely that most RAAC panels exhibiting defects were installed before the mid-1990s.

The viability of any claims against contractors or construction professionals is likely to depend on the underlying cause of the defect in the relevant RAAC panel and the type of building in which it was used.

> ***"The viability of any claim... is likely to depend on the underlying cause of the defect in the relevant RAAC panel and the type of building in which it was used.***

Claims arising from the original installation of RAAC panels

Claims against contractors for breach of contract in respect of defects in RAAC panels caused by errors during the original construction process are very likely to be time barred. For breach of contract claims, causes of action have a limitation period of six years for simple contracts or 12 years for contracts executed as deeds.

The usual position in such claims is that the clock starts ticking for limitation purposes at practical completion.[2] Therefore, unless practical completion was achieved after late 2011, any cause of action for breach of contract will be statute barred.

Given what we know about when RAAC was commonly installed, it is very likely that claims for breach of contract against contractors for errors in the original construction will be time barred.

As regards construction professionals, the same limitation position would apply for any claims for breach of contract. It is also very likely that claims against construction professionals in negligence will be time barred. The limitation period for such claims is six years from the date of the cause of action[3] or three years from the date when the claimant knew, or ought to have known, about the cause of action, subject to a longstop of 15 years.[4]

What about the Defective Premises Act 1972?

Under the Defective Premises Act 1972 ("DPA"), a person taking on work for or in connection with a dwelling owes a duty to ensure that work is done in a workmanlike or professional manner, with proper materials so that the dwelling is fit for human habitation.[5]

The duty is owed to the person to whose order the dwelling was provided or the work done, and any person who acquires a legal or equitable interest in it, such as a purchaser or tenant. The limitation period in respect of claims under the DPA has been extended by virtue of the BSA to 30 years if the cause of action accrued before 28 June 2022.[6]

There may, therefore, be viable claims where limitation has not expired under the DPA relating to the original installation of RAAC panels in dwellings from late 1993 onwards, provided that the defects can be shown to render the dwelling unfit for human habitation.

While it is possible that defective RAAC panels would meet that test (given they appear to be risk to the health and safety of occupants), the extent to which RAAC panels were installed in residential accommodation is not clear as the focus so far has been on their use in the public sector. Even with the extended limitation periods brought in by the BSA, it is clear that the vast majority of claims would still be time barred in any event.

Claims arising from events occurring while RAAC panels are in service

Problems with RAAC panels are often caused by refurbishment works or other works to existing buildings containing such panels where the builders work openings or service penetrations have been formed in existing RAAC panels. These further modifications can undermine the structural integrity of RAAC panels, particularly where no additional supports are provided.

If such further works were carried out much later than the original installation of the RAAC panels, then there may be potential claims against the contractors or designers in respect of those works where limitation has not expired. Such claims may exist where it can be shown that the defects to the RAAC panels were caused by its modification during the further works.

Conclusion

Given the passage of time since the construction of many buildings containing RAAC, it is likely that claims relating to their original construction will be time barred. There may be some scope to bring claims under the DPA for defective RAAC panels in residential dwellings but this will be limited to those completed after late 1993.

While we may see an increase in potential claims for damage caused to RAAC panels during refurbishment or maintenance works to existing buildings, it seems unlikely that claims arising from original construction will "RAAC up". ■

1. Further details about the technical information discussed here came be found in The Institution of Structural Engineers, Reinforced Autoclaved Aerated Concrete (RAAC) Panels Investigation and Assessment, February 2022. (See *IStructE statement: Reinforced Autoclaved Aerated Concrete (RAAC) - The Institution of Structural Engineers.)*
2. See, for example, *Swansea Stadium Management Company Limited v (1) City & County of Swansea (2) Interserve Construction Limited* [2018] EWHC 2192 (TCC).
3. Limitation Act 1980, section 2.
4. Limitation Act 1980, section 14B.
5. Defective Premises Act 1972, sections 1(1) and 2A.
6. Building Safety Act 2022, section 135(1).

A Closer Look at the Building Safety Act

Energy and the dilemma of delivery

The world is using more energy each year, not less. While the rate of growth has slowed (now averaging around 1% to 2% per year), overall consumption continues to grow. **Rebecca Cook** and **Nicholas Gould** take a closer look at what can be done.

At the same time as energy use goes up, the world (generally) has committed to various climate change objectives, most notably the Paris Agreement and widespread "net zero by 2050" targets. Achieving these objectives will require a significant decrease in the use of carbon emitting energy sources (coal, oil and natural gas) and an even more significant increase in the use of renewable and other low carbon energy sources.

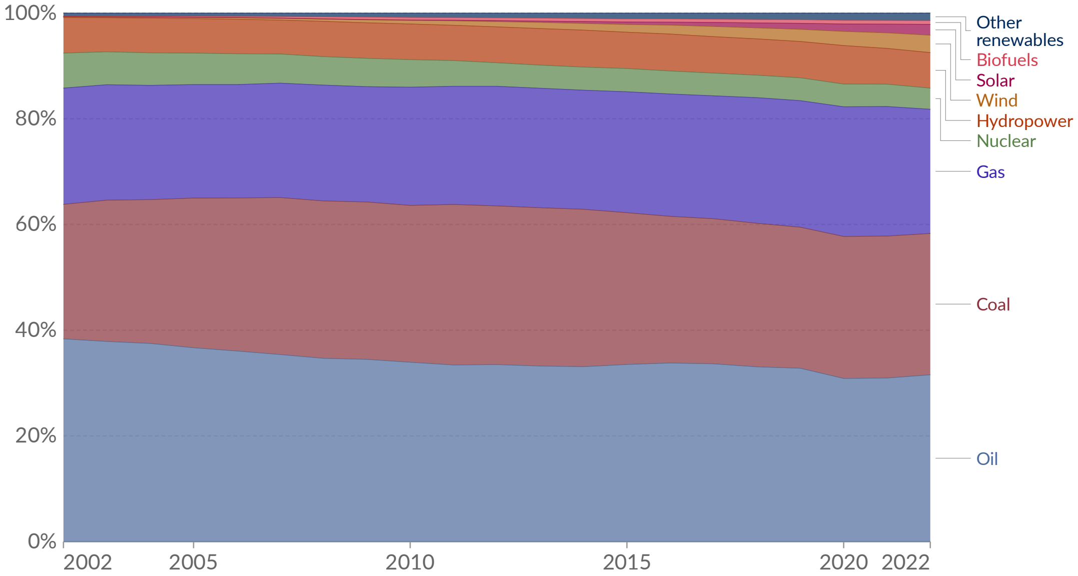
That has not, as of yet, occurred. As depicted in the graphs below, consumption of carbon emitting energy sources remains dominant[1] and all types of energy sources (both renewable and carbon emitting) are growing to fuel increasing demands.[2]

The challenge at hand, therefore, is ensuring that increased demands are met whilst also transitioning away from carbon emitting energy sources towards renewable and low carbon energy sources. While the significant pipeline of renewable projects worldwide will undeniably go some way to addressing this challenge, the question is whether it will be enough.

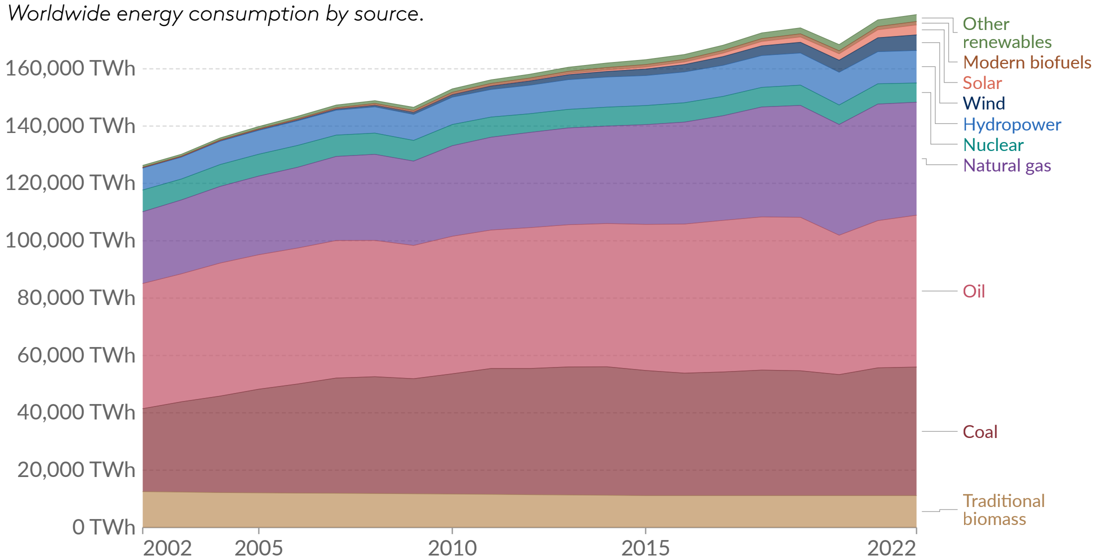
Understanding the baseload

In seeking to answer this question, it should not be overlooked that not all energy sources can be used in the same way.

Every functioning country requires a baseload of electricity, being the minimum amount of electric power needed to be supplied to the electrical grid at any given



Worldwide energy consumption by source.



Global primary energy consumption by source, calculated based on the "substitution method" which takes into account the inefficiencies in fossil fuel production by converting non-fossil fuel energy into the energy inputs if they had the same conversion losses as fossil fuels.

time. Baseload power must be supplied by constant and reliable sources of electricity, otherwise demand could exceed supply (i.e., there will be no electricity). Variable load energy, on the other hand, is where the load varies from time to time due to uncertain demands of consumers.

The difficulty is that baseload supplies are currently provided predominantly by carbon emitting energy sources (not renewable or low carbon) or nuclear energy (carbon neutral but not renewable and produce radioactive waste which is an environmental concern). This is because they are reliable and constant, and traditional sources of energy. Comparatively, all current renewable energy supplies (wind, hydro, solar) are variable – to varying degrees – so generally cannot provide the minimum baseload required because they are neither constant nor reliable (e.g., a dry year for hydro, light wind for wind or low sun for solar).

Given that renewable energy cannot currently provide the baseload (practically and cost effectively), yet the demand on the baseload continues to increase, it is difficult to see how renewable energy will overcome the demand-*cum*-climate predicament – at least in the short term while construction and technology catches up and renewables can become an effective source of baseload (or an effective substitute).

Impediments to delivery

For construction to "catch up" (i.e., reach a point where there are sufficient renewable energy sources to drastically reduce, and ultimately remove, the need for carbon emitting energy sources), several other impediments to the delivery of renewable energy projects will need to be addressed. Well-known examples include (albeit vary according to jurisdiction) the existing infrastructure, regulation, cost, access, market capability and capacity, storage, technology, market interruptions (Covid-19 and war), investment, and so on.

What is particularly interesting from a legal perspective is the emerging risks associated with renewable energy projects specifically and, as the volume of projects increases, the importance of considering and adequately dealing with those risks at the outset to ensure the successful delivery of such projects noting the required acceleration.

Given the prominent rise in offshore wind farm projects, some specific risks include:

- **Interface risks:** typically, there are many interdependent packages of work, contractors and suppliers. For example, foundations and the wind turbine generator; foundations and cables; and supply, transportation and on/offshore installation of equipment, as well as the installation vessels, crew transport vessels and supply ships. Cooperation between different contractors is required;
- **Environmental Impact Assessment:** taking into account the environmental constraints and wildlife considerations;
- **Allocation of seabed risk:** subsea cables, foundations, installation vessel (jack-up/fix legs to seabed);
- **Adverse weather conditions:** such as wave heights, wind speeds, storms;
- **Power curve test:** tests on completion to see if the wind turbine generator is working at its rated capacity;
- **Marine warranty surveyor provisions:** an independent insurance expert is required to approve certain offshore transport operations. Also, consider the scope of the insurance required;
- **Design liability:** the fitness for purpose obligation is onerous and is often diluted if the project delivery is split into multiple packages; and
- **Health and safety:** additional considerations arise because the work is offshore.

Construction contracts will need to be developed to ensure they are fit for purpose.

Where to from here?

While the future delivery of energy projects will be difficult (and, at times, painful) as energy demands continue to increase at a time where carbon emitting sources decrease and renewable resources increase dramatically, the future is certainly not "*doomed*". To the contrary, the future is full of opportunities for those involved in renewable and low carbon energy projects as technology advances and collective intelligence combines to design and deliver new and better projects. The reality is that the transition will simply take time.

Until there is a solution to the ability for renewable or low carbon emitting energy sources to effectively provide the baseload, a possible middle ground for the short to medium term may be a combination of nuclear and wind (or possibly solar) with an ongoing need to address waste-to-energy.

Is fusion the future of renewable energy?

Further ahead, nuclear fusion may be the solution given it is entirely renewable (it uses easily attainable materials as compared to fission which uses the non-renewable material of uranium to generate reactions), can produce more energy than it consumes, is safe, and provides a sufficient baseload that is constant, thereby meeting all criterion. However, harnessing fusion energy comes with its challenges and remains a work in progress albeit with several recent advancements.

Such advancements include the International Thermonuclear Experimental Reactor ("ITER") project currently under construction in Provence, France.[3] ITER is the world's largest international fusion experiment, conceived as the last experimental step to prove the feasibility of fusion as a large-scale and carbon-free source of energy. A consortium of nations (China, the European Union, Switzerland, India, Japan, Korea, Russia and the United States) are collaboratively designing and constructing ITER to advance science and technology to the point where demonstration fusion power plants can be designed.

Fusion energy was also included in the UN dialogue and deliberations for the first time in 2021 at COP26, marking a turning point for fusion as an integral part of the future of renewable energy and the wider global energy challenges. ■

1. Taken from *ourworldindata.org/grapher/energy-consumption-by-source-and-country?time=2002..latest*. See also *www.un.org/en/climatechange/raising-ambition/renewable-energy* and *https://www.iea.org/reports/world-energy-outlook-2022/key-findings*.
2. Taken from *ourworldindata.org/energy-production-consumption*. See also *www.iea.org/reports/world-energy-balances-overview/world*, *https://www.un.org/en/climatechange/raising-ambition/renewable-energy*, *https://www.iea.org/reports/global-energy-review-2021/renewables* and *www.statista.com*.
3. See *www.iter.org*.

PFI: a round-up from the courts

In a PFI/PPP project, a public authority enters into a project agreement with a special-purpose vehicle project company to finance and construct new infrastructure assets and to thereafter maintain and service the assets for a fixed period, usually 25 years. The project company engages a design and build contractor to construct the assets, and a facilities management ("FM") contactor to maintain and service the assets following completion. At the end of the services period, the project company and the FM contractor depart, and the public authority assumes full control of the assets – usually known as "handback".

PFI/PPP project agreements are notoriously complex and the extended suite of associated contracts for each project frequently fail to achieve the intended seamless dovetailing of interlocking rights and obligations. Despite this apparently fertile ground for squabbling, in the experience of **Edward Lowery**, comparatively few PFI disputes (from the 850 or so UK PFI projects) have reached the courts; this is because almost all PFI projects include sequential dispute resolution procedures that can act as a brake on disputes, but also because these procedures invariably prescribe private fora for disputes – expert procedures, adjudication and arbitration.

Hence, thus far, there has been little specialist guidance from the bench as to how PFI contracts are to be approached. The courts have previously confirmed that PFI contracts are relational in nature and, therefore, subject to a duty of good faith[1] but this has not been massively helpful. Many PFI contracts already include express obligations of good faith and, in practice, an obligation to act in good faith does not greatly assist resolving complex contractual disputes on particular facts where both sides will have acted in good faith when arriving at contrary positions.

Whilst the number of PFI project disputes coming before the courts is increasing, it is still something of a trickle; of the half dozen or so PFI dispute judgments handed down over the last 12 months, the following are worth a look.

Solutions 4 North Tyneside Ltd v Galliford Try Building 2014 Ltd[2]

S4NT entered into a PFI project agreement with North Tyneside Council for the construction of new sheltered housing blocks, refurbishment works to existing properties and the provision of services at the sites for 27 years following completion.

S4NT sought various declarations as to the proper interpretation of the design and build contract with Galliford, including that for the refurbishment works. Galliford had to achieve the design life and residual life expectancy required at the date of handback.

The judge found Galliford was obliged to carry out the refurbishment works to the standard for completion specified in the design and build contract and bore no responsibility for the condition of the properties at the end of the services period.

St James's Oncology SPC Ltd v (1) Lendlease Construction (Europe) Ltd (2) Lendlease Construction Holdings (Europe) Ltd[3]

Here, the project agreement and design and build contract set out a long list of technical and construction design criteria for a new Oncology Centre at St James' Hospital in Leeds, encompassing various NHS health technical memoranda ("HTM") including HTM 81 (fire precautions) and HTM 2007 (electrical services supply and distribution). Non-compliance with these criteria was permitted as long as the design could be justified on the basis of a fire-engineering approach and the design standard achieved was equal to or better than HTM 81.

The design criteria required 60-minute fire compartmentation for each of the spaces within the electrical plantroom housing the transformers, the generators and the switch gear. However, no discrete compartmentation was installed; instead, the electrical plantroom formed a single fire compartment.

The judge found that Lendlease could neither justify the plantroom compartmentation installations as part of a fire engineering approach nor explain how these installations would achieve the necessary standard of safety. The judge further concluded there had been no meaningful approval of the "*as built*" design by the Hospital Trust, Building Control or the fire and safety authority, and that any such approvals would not have excused Lendlease who remained responsible at all times for achieving compliance with the requirements of the design and build contract.

Kajima Construction Europe (UK) Ltd and Anor v Children's Ark Partnership Ltd[4]

This case concerned the enforceability of the sequential dispute resolution procedure in the design and build contract made between the project company, Children's Ark Partnership, and Kajima.

In order to avoid limitation issues, the project company commenced court proceedings that Kajima contended were premature where the pre-litigation steps in the dispute resolution procedure had not been completed. The Court of Appeal agreed with the lower court that the dispute resolution procedure in the design and build contract was unworkable and, therefore, unenforceable where it:

(i) adopted the procedure in the project agreement and, thereby, transposed mechanisms that Kajima could not comply with; and

(ii) was insufficiently certain to be enforceable given that there was no meaningful description of the process to be followed and no unequivocal commitment to engage in any particular form of ADR.

The Court of Appeal also endorsed the lower court's finding that if the project company's claim form had been struck out, this would have been a draconian remedy that was unsuitable for the circumstances of this case; and, thus, even if the design and build contract dispute resolution procedure had been enforceable, a stay would have been granted.

1. *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC).
2. [2022] EWHC 2372 (21 September 2022).
3. [2022] EWHC 2504 (TCC) (12 October 2022).
4. [2023] EWCA Civ 292 (17 March 2023).
5. [2023] EWHC 644 (TCC) (22 March 2023).
6. For more information on the White Fraiser Report, refer to the article by Gemma Essex and Laura Bowler on pages 44-47.

Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Ltd & Ors[5]

Hadfield was the project company engaged by the Trust to design, build and, thereafter, operate a new wing for the Northern General Hospital. Hadfield engaged Kajima as design and build contractor and Veolia as hard services provider for the wing during the services period.

During 2017, some 10 years after completion, the Trust began to identify defects in the fire protection installations and commenced court proceedings against Hadfield alleging design and construction defects. Hadfield commenced Part 20 proceedings against both Kajima and Veolia. In response, Kajima issued an application for reverse summary judgment and/or to strike out elements of Hadfield's pleading. Veolia applied for security for costs against Hadfield.

The judge found that Kajima had not satisfied the test for summary judgment and dismissed the strike out application on grounds that Kajima had not demonstrated that Hadfield's statement of case disclosed no reasonable grounds for bringing the claims. The judge concluded that it would be just to make an order for security in favour of Veolia where this was unlikely to lead to Hadfield's claims being stifled and/or insolvency.

Summary

Although these four cases cover typical and contemporary PFI issues, it is only *Kajima v Children's Ark Partnership* that can be said to provide some meaningful general guidance on a key issue common to PFI projects; that is, the need for compliance with and/or enforceability of sequential dispute resolution procedures.

During August 2023, HM Government published the White Fraiser Report with the informative subtitle, *"A report into the status and behaviours, relationships and disputes across the Private Finance Initiative (PFI) Sector"*.[6] Having noted that the predominance of private dispute resolution procedures meant that the same disputes were being decided again and again behind closed doors, the authors recommended that anonymised versions of adjudicative decisions should be made publicly available, thereby allowing a body of "PFI common law" to develop. Unless and until this library of anonymised PFI decisions is established, it looks as if we are going to have to continue to rely upon PFI scraps from the judicial table. ■

> *Having noted that…the same disputes were being decided again and again behind closed doors, the authors recommended that anonymised versions of adjudicative decisions should be made publicly available, thereby allowing a body of "PFI common law" to develop.*

Breaking up need not be hard to do: preparing for PFI contract expiry

Introduction

When any long-term commercial relationship comes to an end, patience, compromise and cooperation will often be required in order to avoid an acrimonious parting. Long term PFI project contracts provide fertile grounds for valedictory disputes: when the project assets are handed back to the public authority at the end of the services period, the public authority will expect the private sector project company to fulfil its contractual obligations apropos the standard and condition of the assets that are to be handed back. The public authority will usually want the project company to fully fund all repair and replacement costs before it relinquishes responsibility for maintenance and lifecycle works but the opacity of the contractual requirements for handback can lead to unreasonable expectations on both sides, which in turn fuels disputes.

Managing the hand back process to minimise the risk of such disputes can require very careful relationship management between the public and private sectors. As **Laura Bowler** and **Gemma Essex** outline below, the potential for relationships to sour with disputes the inevitable consequence, has at least been recognised by the government.

Handback mechanisms: *an ancien régime?*

During the 1990s and into the first decade of the 20th century, PFI projects were a politically acceptable procurement route to fund the construction, operation and maintenance of infrastructure and other public assets.

PFI contracts were necessarily of long-term duration, so that the public sector project companies could recoup their initial construction CAPEX spend via public sector monthly payments across service periods typically of between 20 and 35 years.

Drafting PFI contracts handback mechanisms during the 1990s necessarily required some crystal ball gazing: those doing the drafting had little idea of the political and economic landscape that would prevail 30 years in the future, and more importantly, of how the assets would perform in the framework of the lifecycle and maintenance obligations that would apply over the services period. Many PFI contracts were completed against the clock in frenetic circumstances and with a multitude of agreements to check and finalise it is not surprising that clauses that would not be needed for several decades attracted less attention.

With a small number of PFI projects having already come to an end but with an increasing number approaching services period expiry, the general impression is that with the dust blown off, handback mechanisms are frequently deficient. By way of a fractious starting point, many PFI contracts do not make clear which party is to bear the cost of the pre-handback survey that will be required to assess the condition of the assets: for a large hospital, the cost of a full survey could be sufficiently high to trigger an initial dispute over who is to pay for it, before the condition of the assets has even been considered! Even where well crafted, PFI contracts typically prescribe the required standard and condition of the assets at handback in complex but necessarily non-absolute terms, that are open to interpretation. For example, NHS Estate Code condition B requires that all internal finishes, fixtures and fittings shall be, *"sound, operationally safe and exhibiting only minor deterioration"* which leaves plenty of room for argument.

With both the public and the private sector parties often left in something of a contractual no man's land vis-à-vis the handback process and their respective

obligations, it come as no surprise that disputes, often concerning polarisingly large amount of money, will fester and grow.

Official guidance

It is generally accepted that the inherent risks of disputes associated with PFI contracts (or any contracts) can be mitigated by cooperation, communication and contractual compliance. Whilst the government has no power to intervene in private contracts it has at least tried to foster a sense of reasonable pragmatism in the PFI industry.

The IPA guidance

During February 2022 the government's Infrastructure and Projects Authority ('the IPA') published a 74-page document entitled, *"Preparing for PFI contract expiry"* and sub-titled, "Practical guidance for contracting authorities on managing expiry and service transition".

This document was presented in four parts:

- Part A explained why managing the expiry and transition process was vital for ensuring value for money and the continuity of public services. Part A included recommendations on how to prepare for and manage the expiry and transition process.
- Part B was concerned with how to implement the expiry recommendations and included detailed guidance on actions that could be undertaken to ensure a successful PFI contract expiry and transition to future services provision.
- Part C was the summary section, providing a quick reference 'grab guide' for users, drawing together key recommendations on actions and processes.
- At the end of the document the IPA included an expiry toolkit, which provided additional methods and materials to support public authorities in managing expiry and handback.

The IPA guidance in particular highlighted the importance of starting planning for expiry and handback well in advance – seven years was recommended – to enhance the prospects of ensuring that the process was sufficiently resourced, that the parties were clear on their respective roles in the process and so that potential disputes could be managed and amicably resolved.

Albeit primarily aimed at public sector bodies preparing for PFI contract expiry, the IPA's guidance recommended a collaborative approach to PFI contract management and was therefore relevant to both public and private sector parties.

The White Fraiser Report

During November 2022 the IPA commissioned an independent report on the status of behaviours, relationships and disputes across the PFI sector with a view to making recommendations for improvements. It was expected that the report would examine the extent to which negative working practices had arisen across the PFI sector, the reasons why and go on to consider recommendations for improvement.

The report, prepared by the eponymous duo Barry White and Andrew Fraiser, was published on 20 July 2023. The White Fraiser Report set out several (anonymised) findings and observations that were entirely familiar to anyone who has been closely involved in the PFI sector over the last ten years, including as follows:

- The authors acknowledged the widely recognised public sector contention that the private sector could be reluctant to engage in proactive performance management of service provision, until forced into doing so by the robust application of complex dispute mechanisms. Likewise the common private sector complaint that project companies are often taken unawares by sudden shifts in their public sector partner's approach to contract management.
- That an oft-reported catalyst for the public sector adopting a shift in approach is the instruction of consultants who rather than aiming to facilitate ongoing improvements in service delivery, usually counsel aggressive application of the contract payment mechanism, seeking to penalise historical performance to benefit the public sector's budget position.
- That such unprompted changes in approach deny the parties the opportunity to collaboratively consider how any such change in approach can best be implemented to maximise performance delivery. More often than not, such changes in approach can quickly escalate into complex and potentially avoidable disputes, that are inimical to developing or maintaining any culture of cooperation between the project stakeholders.
- Notwithstanding the propensity for conflict, only around 1% of PFI contracts lead to disputes requiring the third-party intervention of a dispute resolution procedure. (It will be of no surprise that healthcare remains the sector in which disputes are the most prolific.)
- Despite the small proportion of projects embroiled in ongoing disputes, such projects often require the most attention. In circumstances where the squeaky wheel gets the oil, projects in which the parties are engaged in long-running disputes will necessarily occupy much of the time, cost and resources of project companies – which can only serve to dissuade future investment in UK infrastructure.

By way of an antidote, if not a panacea, the White Fraiser report introduced the concept of a "reset" period in which the parties sit down and review their contract management position afresh and agree on an approach to contract management going forward and in the run up to expiry.

- The reset period is premised on the private sector partner being granted relief from payment of accruing contract deductions for a period of, say, six to twelve months whilst they improve project performance to the contractual standards required by the public sector. (This approach could be considered somewhat aspirational and potentially impossible in circumstances where an acrimonious dispute is already underway.)
- The "reset" idea is predicated on the public sector providing the project company with the opportunity to deliver assured performance standards over a time period in which deductions continue to accrue but are not applied. However, the idea has, with some justification, been characterised as merely, "kicking the can down the road".
- For a reset to generate genuinely beneficial progress requires redefinition of the parties' ongoing relationships. In the case of healthcare project agreements, it stands to reason that delivering the best performance for staff and patients alike should be reason enough for all parties to engage in a collaborative reset period in good faith.

The report endorses the reset approach and gives a stark warning to parties failing to act accordingly:

"We are satisfied that the 'reset' approach will provide all parties with not just the opportunity to achieve assured performance of PFI Contracts, but also an opportunity to enrich the relationships and goodwill between them. Some SPVs and/or Public Authorities may, instead, choose to bury their heads in the sand and hope things improve. Our view on this is clear. They won't".

Where the public sector's primary motivation is maximising deductions (whether or not encouraged to do so by rapacious consultants) and the private sector is desperate to generate shareholder value or mitigate budgetary constraints, the goodwill of other stakeholders seeking to deliver the best performance of the asset will inevitably be undermined. Equally, where there are contractual limitations placed on parties with entrenched positions, whether there is sufficient incentive to prioritise service delivery in circumstances where there is little accountability or financial advantage, remains to be seen.

The executive summary in the White Fraiser report sets out the following robust observation on the conduct of parties to PFI contracts:

> *"... feedback from consultees to suggest that the manner in which a number of Public Authorities have implemented their change in approach has often involved overly draconian (if not forensic) enforcement of the terms of the PFI Contract accompanied by, on occasion, unprofessional behaviour. When this approach has been taken by Public Authorities, disputes have typically resulted, relationships have broken down and accompanying goodwill has been lost. More worryingly, we heard stories of how this approach has had a negative impact on the wellbeing of individuals".*

Whilst the White Fraiser Report does not relate exclusively to the handback or expiry of PFI contracts, the report's findings regarding the current state of PFI relationships and party conduct, collaborative or otherwise, are relevant to the attitudes that will govern the outcomes for the increasing number of projects approaching expiry.

Practical steps for handback

It must be right that in order to prepare for a hopefully successful handback, the parties should be encouraged and incentivised to start discussions early with a view to agreeing the (or a fresh) applicable process for assessing the condition of the assets to be handed back to the public sector and facilitating a transition that ensures continuity in service provision.

In the light of the IPA guidance and the White Fraiser report, set out are below some practical steps that parties may consider implementing to assist the handback process:

- **Be prepared:** As noted, the IPA guidance recommends that planning for handback should begin a minimum of seven years before the expiry date. Although this may seem overly cautious and unnecessary, in the context of the day-to-day project activities, underestimating the time and cost associated with handback risks unnecessary disputes.
- **Best-laid plans:** By failing to prepare, parties are preparing to fail. Initiating discussions around expiry requirements (including the condition of assets) and agreeing a plan before commencing the handback process will assist in both establishing communication between the parties as they clearly define the parameters of the handback process and ownership of the assets. This is all the more important if at some point during the service period, the contract and the project company's obligations have been materially varied.
- **Clarifying the contractual status of the asset:** This should be done from the outset - so that the parties start on the correct footing - and regularly updated, particularly where there have been variations and/or market testing, so that there are no surprises when the handback stone is turned over.
- **Build relationships:** Identify key individuals from each party to minimise confusion and encourage collaboration between the parties. Ideally, parties should engage or nominate specific individuals to manage the transition process, in order that operational resources are not compromised.
- **Financial arrangements:** Regularly review the financial arrangements, including any outstanding payments, penalties or cost-sharing provisions, seeking confirmation that all financial obligations are met as specified in the contract or otherwise agreed.
- **Asset condition:** PFI contracts typically contain a requirement for a handback survey to ascertain the condition of the asset. Carrying out a preliminary condition survey on the assets and assessing what needs to be handed back and, importantly, what condition it is required to achieve under the contract will help ascertain the scope of work required to bring the asset to the required standard.
- The IPA guidance suggests that such an initial survey should take place around five years before expiry, with a final survey taking place around two years before expiry. Whilst the timing of these surveys can be agreed between the parties, the IPA guidance sensibly warns that the duration of such surveys is typically underestimated and so should be commenced sooner rather than later, to enable any work that needs to be undertaken to be carried out before handback.
- Where the contract makes no express provision (and project agreements frequently do not), the parties may wish to consider agreeing the appointment of an independent third party to carry out the survey to reduce the scope for disputes generated by perceived bias. By assessing the current condition of the assets, parties should be assisted in the formulation of plans to determine any work that will be required for handback.
- **Moving on:** The public authority will need to consider not only who will be taking over from the project company on expiry of the PFI contract, but specifically whether the services are going to be brought back in house or re-procured via a new contract with a different private sector partner. Ideally, the post expiry service provider should be involved in the handback process as early as possible, so that the parties can plan for the transition from the PFI arrangement to a new operational model. This ensures a smooth transition between the PFI and post expiry service provision whilst maintaining service continuity and minimising disruption.
- **Stakeholder engagement:** It will be of fundamental importance to engage with stakeholders, including employees, service users, and the public to keep them informed about the plan and address any concerns or questions they may have. Engaging with stakeholders should assist with the seamless transfer of data, information, and knowledge from the project company to the public sector or to the new private sector service provider. ■

In order to prepare for the successful handback of a PFI, parties are encouraged and incentivised to start discussions to agree contemporarily applicable processes and protocols, to confirm not only the condition of the assets to be handed back to the public sector, but to facilitate a transition that ensures continuity in service provision.

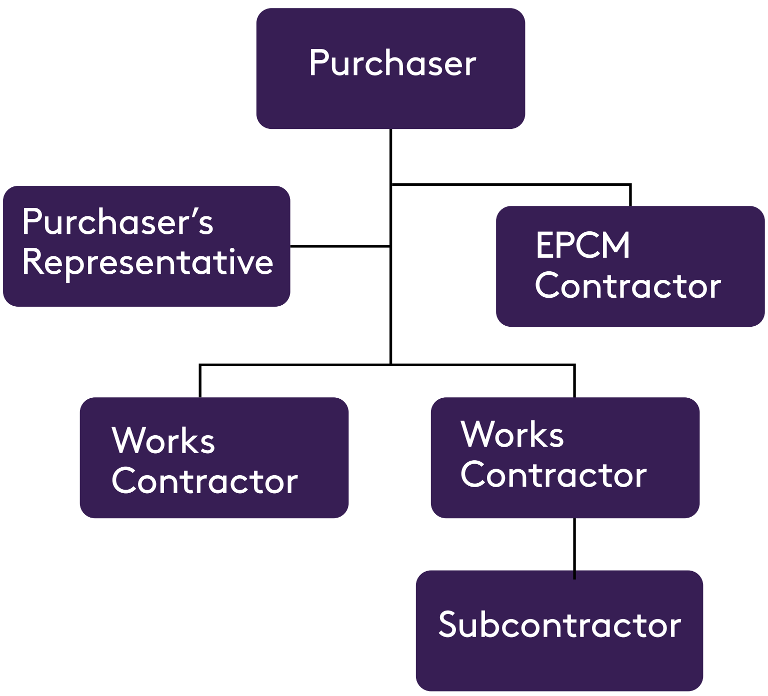
Review of the Institution of Chemical Engineers ("IChemE") Engineering, Procurement and Construction Management ("EPCM") Contract, first edition 2023

Earlier this year, the Institution of Chemical Engineers ("IChemE") published its Engineering, Procurement and Construction Management ("EPCM") contract into the market, known as "the Blue Book". With other publishing bodies like FIDIC expected to follow suit in the near future, **Mark Pantry** reviews the industry's first attempt at a standard form EPCM contract.

What is EPCM?

EPCM is a form of procurement for major construction projects which, while sounding very similar to Engineering, Procurement and Construction ("EPC") contracts, is very different in its approach. An EPC contract is a type of turn-key contract where the EPC contractor takes full responsibility for the design, procurement and construction work forming the project, including the cost and time risks associated with delivering the project.

An EPCM contract is closer to a services contract in that the EPCM contractor provides engineering services to design the project and manages the construction works. The EPCM contractor is not expected to carry out any of the construction works and these would be carried out by works contractors engaged by the client (or "purchaser" as referred to in the Blue Book).



An EPCM contractor has no responsibility for the works undertaken by the works contractors appointed by the purchaser; instead the EPCM contractor is expected to manage the works contractors on the purchaser's behalf to deliver the project to an agreed specification.

The Blue Book

While the other contracts in the IChemE suite are generally for domestic use in the United Kingdom, the Blue Book has been drafted for use on international projects and the parties to the contract are free to agree on the jurisdiction of the contract in Article 17 of the Agreement.

The Blue Book follows a fairly standard approach of contract structure having: (i) the Agreement, (ii) the General Conditions, (iii) the Optional Conditions, (iv) the Special Conditions, (v) the Specification, and (vi) the Schedules and the Annex. Clause 1.2 of the General Conditions sets out an order of precedence for these documents which form the contract, but it should be noted that there is no order of precedence for documents within each heading. If, for example, the parties require one document forming part of the Specification to take precedence over another, then this would need to be addressed in a specific amendment in the Special Conditions.

The Agreement sets out the contract particulars, including the names of the parties, the plant to be constructed and the location of the site of the plant. The Agreement also includes statements as to which of the Optional Conditions apply and whether any Special Conditions apply.

The Optional Conditions are comprised of three options: A, B and C. Part A sets out some UK-specific clauses for domestic projects, mainly limited to the application of statutory adjudication in the event of a dispute and the application of health and safety legislation. Part B contains specific clauses to be used where the contract is to be a target cost contract. Part C contains a number of project-specific clauses; for example, an agreement between the parties to use a dispute review board in relation to the settlement of disputes.

The 22 Schedules set out in the Agreement include many of the project-specific information referred to in the General Conditions, and the Guidance at the back of the Blue Book helpfully details the expectations of the content of these Schedules. Schedule 1 (Description of the Services and the Works) defines the role of the EPCM contractor and the services to be provided, including design work, procurement and management of the construction of the plant. Clause 3.2 of the General Conditions states that the "*EPCM shall carry out the Services*" with the reasonable skill and care to be expected of a qualified and competent EPCM contractor, a standard of skill and care similar to that of a professional consultant.

It should be noted that, if the EPCM contractor fails to perform the Services in accordance with any period stated in Schedule 11 (Times of Completion), the EPCM contractor may be liable to the purchaser for delay liquidated damages. Any liquidated damages payable would be capped at the amount stated in Schedule 12.

Pricing arrangements

The Blue Book has a flexible approach to pricing arrangements and can be adapted to be a reimbursable cost contract, a target cost contract (if Part B of the Optional Conditions is used), a lump sum contract or anything in between. The choice of pricing arrangement allows the parties to tailor the level of risk taken on by the EPCM contractor.

The purchaser makes payments to the EPCM contractor in accordance with Schedule 18 which should clearly set out the elements which together form the Contract Price. The Contract Price can be stated in one or more currencies. If a reimbursable or target cost arrangement is being used, then the Contract Price will be the total of the payment made for the cost elements set out in Schedule 18. The guidance contains a typical list of main cost elements for reference when the parties are compiling this Schedule.

Testing and commissioning

As to be expected for complex plant contracts, the Blue Book includes detailed provisions on the process for the completion of construction works, taking over, performance testing and acceptance. The EPCM contractor is responsible for managing the process of performance testing and investigating with the relevant works contractors as to the cause of any failure to pass a performance test. Any additional cost incurred by the EPCM contractor in such investigations of failed tests forms part of the Contract Price.

It should be noted that the Blue Book does contain the option for there to be performance guarantees provided by the EPCM contractor in relation to the successful performance of the plant. This is unusual and, as anticipated in the guidance, because the EPCM contract is dependent on the successful performance of the works contractors, it would be unlikely that an EPCM contractor would accept liquidated damages for the poor performance of the constructed plant except to the extent it has been directly caused by the EPCM contractor; for example, because of the EPCM contractor's negligent design or management of the works contractors.

Works Contracts

Under the EPCM model, the actual works are to be undertaken by works contractors appointed by the purchaser. The EPCM contractor manages the works contractors on behalf of the purchaser. In the Blue Book, clause 9 of the General Conditions set out the specific role of the EPCM contractor in managing the works contractors with Schedule 7 setting out the procedures to be followed.

The EPCM contractor proposes the scope for each works contract and proposes suitable tenders for each package. The purchaser's representative then approves the appointment of each works contractor. The EPCM contractor negotiates each works contract in accordance with the requirements contained in Schedule 7. The terms of each works contract are to be agreed between the parties but the Blue Book guidance notes suggest that other forms of IChemE contracts are used, such as the Red, Burgundy, Green or Orange Books. If these IChemE contracts are used as works contracts then they would need to be amended for this purpose; in particular, including modification to allow the management of the works contract by the EPCM contractor.

Conclusion

The IChemE Blue Book is the first standard-form EPCM contract available and provides a useful starting point for complex plant projects where the EPCM procurement method has been chosen. With other organisations likely to publish similar forms in the future, it will be interesting to see differences in approach and whether clients which currently use bespoke forms of EPCM contract will be willing to switch to a standard form. ■

Adjudication: cases from *Dispatch*

Our usual case round-up comes from two different sources. As always, we highlight here some of the more important cases which may not be covered in detail elsewhere in the *Review*. First, there is our long-running monthly bulletin entitled *Dispatch*. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please visit our website. If you would like to receive a copy every month, please contact **Jeremy Glover** or sign-up online.

We begin by setting out some of the most important adjudication cases as taken from *Dispatch*. Second, there is the *Construction Industry Law Letter* ("*CILL*"), edited by Fenwick Elliott's **Karen Gidwani**. *CILL* is published by Informa Professional. For information on subscribing to the *Construction Industry Law Letter*, please contact Kate Clifton by telephone on +44 (0)20 3377 3976.

Had Henry started their "true-value" adjudication prematurely, in light of an ongoing "smash and grab" referral?

Henry Construction Projects Ltd v Alu-Fix (UK) Ltd

[2023] EWHC 2010 (TCC)

Henry applied for summary enforcement of an adjudicator's decision in the sum of £190k. Alu-Fix said that the commencement by Henry of the true value adjudication ("TVA") before payment of a notified sum pursuant to s.111 of the HGCRA meant that the adjudicator did not have jurisdiction. Henry said that the point was a novel one, and was not a jurisdictional point, as such. Rather, Henry should be allowed to rely upon the decision in the TVA, having paid the immediate payment obligation consequent upon the decision of a previous adjudicator in the prior smash and grab adjudication ("SGA"), which followed the raising by Henry of a genuine dispute, namely asserting the validity of two pay less notices ("PLN") following Alu-Fix's payment application ("PA").

The contract was a JCT Standard Building Subcontract. Alu-Fix made a PA on 15 November 2022 in the sum of £257k and then referred the non-payment to the SGA on 15 December 2022. Henry said there were two valid PLNs, and then, on 18 January 2023, commenced the TVA. The SGA was ongoing. Alu-Fix invited the TVA adjudicator to resign. The TVA adjudicator noted that:

> *"As things currently stand, the question of whether there is an undischarged primary payment obligation is in dispute and is the subject of the adjudication before Mr Rayner. As such, presently there is nothing preventing me from proceeding.*
>
> *In the event Mr Rayner reaches a Decision that there has been a failure to pay a notified sum, then I accept that, unless and until a Court decides that such Decision is not valid, it will be binding on the parties. In such circumstances, I accept that, unless that payment obligation is discharged, it would not be appropriate for me to proceed. However, we are not in that position yet".*

The SGA decision was issued on 27 January 2023 in favour of Alu-Fix. The TVA adjudicator stayed the TVA pending payment, confirming that they would resign if payment was not made in accordance with the decision. Henry made full payment on 2 February 2023 and the TVA stay was lifted.

DJ Baldwin referred at length to the decision of O'Farrell J in the case of Bexheat v Essex Services Group (see *Dispatch*, Issue 263) and the judge's conclusion that:

> *"(i) where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with s.111 of the 1996 Act;*
>
> *(ii) s.111 of the 1996 Act creates an immediate obligation to pay the 'notified sum';*
>
> *(iii) an employer is entitled to exercise its right to adjudicate pursuant to s.108 of the 1996 Act to establish the 'true valuation' of the work, potentially requiring repayment of the 'notified sum' by the contractor;*
>
> *(iv) the entitlement to commence a 'true value' adjudication under s.108 is subjugated to the immediate payment obligation in s.111;*
>
> *(v) unless and until an employer has complied with its immediate payment obligation under s.111, it is not entitled to commence, or rely on, a 'true value' adjudication under s.108".*

Henry said that the case here differed from those previously decided, in that, at the time that the TVA started there was an ongoing "*genuine dispute*" as to the validity of the PLN of 25 November 2022. Therefore, unless and until there was an adjudication that there was no valid PLN, no "*immediate payment obligation*" arose. Accordingly, the embargo on launching a TVA prior to the payment of any immediate payment obligation was not engaged and no question of jurisdiction could arise. The payment obligation became immediate upon the ruling of the SGA adjudicator and that was discharged within the deadline ordered. Henry further said that it could not be right that there might be a nil finding on a valid PLN, but that the TVA nevertheless had to await that outcome before being commenced.

A decision in Alu-Fix's favour would be a huge curtailment on "employers'" rights, especially given that prompt payment of the SGA decision had been made.

Alu-Fix said that a TVA could not be started whilst there remained an unsatisfied immediate payment obligation. The adjudication process was speedy in any event, even without being able to start before the outcome of any SGA. Any immediate payment obligation must be paid to assist with cashflow. The burden was on Henry to either pay upfront before commencing the TVA or, alternatively, on choosing to raise a dispute, to accept that the TVA will inevitably be delayed.

DJ Baldwin said that the key element here was the determination of the commencement date of the immediate payment obligation. If this date was, or was to be treated as being, before 18 January 2023, then Henry was not entitled to commence the TVA and, therefore, the TVA adjudicator could not be said to have had jurisdiction. As the TVA was prematurely commenced, it would be a nullity. Here, the SGA adjudicator decided that the final date for payment was 13 December 2022. The judge could not see any basis for concluding anything different. The judge then applied these facts to the question of jurisdiction. The result was that Henry wa s not entitled to commence the TVA on 18 January 2023 without first having discharged its immediate payment obligation.

The judge made clear that the outcome here did not close the door on commencing a TVA prior to the outcome of an SGA. Whilst it ought to discourage such a course in areas of spurious SGA disputes, that should not deter those who have a sufficient level of confidence that any dispute raised should result in a finding that there was no immediate payment obligation. The difficulty with Henry's submission was that it would risk tipping the balance unfairly towards the disputing party and prejudicing the ultimately vindicated right of the payee to be paid. In other words, the disputing party could not only delay paying what might ultimately, as here, be decided to be a sum which was already due, but also would be able to steal a march on the other party by being permitted to commence a TVA when the notified payment should have been made all along. If there is a genuine dispute as to the notified sum, the payer has the ability to protect itself by issuing a valid PLN.

Had there been a material breach of natural justice?

Home Group Ltd v MPS Housing Ltd

[2023] EWHC 1946 (TCC)

Home sought summary enforcement of an adjudication decision of some £6.6 million. This adjudication followed an earlier one which held that MPS had repudiated the contract.

The referral, served on 17 March 2023, included a quantum expert report of 155 pages, with 76 appendices, which comprised 202 files in 11 sub-folders, amounting to 338 megabytes of data and a further 2,325 files in 327 sub-folders and five factual witness statements (which amounted to 88 pages, with hundreds of exhibited pages sitting behind). MPS had 19 days (or 13 working days) to produce its response to the referral. It claimed at the time of receipt that this was an inadequate period of time and maintained this claim throughout the adjudication process. MPS said that it was unable to properly digest and respond to the material served with the referral and that this was a breach of natural justice which led to a material difference in the outcome, and that, as such, the decision was unenforceable. MPS said that Home should simply have provided MPS with a greater opportunity to understand the claim, whether in advance of the Notice of Adjudication or by agreeing to an extended timetable in the adjudication.

Constable J noted that MPS "*rightly*" did not press a submission that the dispute was intrinsically so complicated or heavy that, in no circumstances, could it have been subjected to adjudication. Such a contention would, in any event, have failed. The relevant issue – where the adjudicator had considered the position but expressed the clear ability to render a fair decision – would inevitably centre upon the timing of the provision of the material to the responding party and its ability to fairly put its case, rather than the complexity of the material.

The judge noted that the authorities demonstrate that arguments based upon time constraints impacting the ability to respond fairly have enjoyed little success. Both complexity and constraint of time to respond were inherent in the process of adjudication and are no bar in themselves to adjudication enforcement. Whilst it was conceivable that a combination of the two might give rise to a valid challenge, where an adjudicator has given proper consideration at each stage to these issues and concluded that they can render a decision which delivers broad justice between the parties, the court will be extremely reticent to conclude otherwise.

Further:

> *"In cases involving significant amounts of data, an adjudicator is entitled to proceed by way of spot checks and/ or sampling. The assessment of how this should be carried out is a matter of substantive determination by the adjudicator and an argument that the adjudicator has erred in his or her approach, absent some particular and material related transgression of natural justice, will not give rise to a valid basis*

> *to challenge enforcement. It would, even if correct, merely be an error like any other error which will not ordinarily affect enforcement".*

There was a question over whether the volume of material served with the referral would fill seven or 32 standard boxes. The judge noted that, regardless, the quantity of information itself did not present a valid basis for challenging enforcement. Further:

> *"in the modern day, conceptualising the extent of electronic data by what it would look like printed will rarely be particularly persuasive or helpful, particularly so where a large quantity of the 'documentation' is in spreadsheets which are not designed to be printed".*

The real complaint was that Home unreasonably refused to provide MPS with data or access to the underlying documents until the last moment and that, in light of the absence of the documents and lack of time, MPS and its expert were unable to fairly interrogate and respond to the material in the referral.

These submissions were without merit, and it was "never realistic" to insist, particularly in the context of an imminent adjudication, that it would be necessary to provide detailed information on each and every line item, and to use this as a reason not to engage in any analysis of the material provided on a sampling basis. When a draft report was provided, MPS could and should have been actively engaged in analysing the material including the underlying material to which they had been offered access.

In the view of the judge, had MPS responded by reserving its position in the first instance on the nature and extent of sampling but still requested access to review the underlying records, it would have been extremely difficult for Home reasonably to refuse. That had not happened, and it appeared that MPS' responses leading up to the adjudication were strategically driven in an attempt to create a jurisdictional challenge that no dispute had crystallised.

Further, MPS had produced a comprehensive response which provided a clear agenda for determination of the dispute. MPS said that there was an absence of substantiation, and the adjudicator, in some circumstances, accepted this. That did not readily sit well with a submission now that MPS was materially prejudiced in its response. In the time available, MPS was able to identify significant areas of dispute and advance arguments based upon a sample of the material which drew attention to what it said were significant deficiencies in the claims. The judge's review of the material suggested that MPS was able to, and did, properly and thoroughly engage in the substance of the claim, and indeed, enjoyed relatively significant success in undermining a number of high-value aspects of the claim.

The judge, accordingly, rejected MPS' submission that by reason of the volume of material, constraints of time and access to material (whether taken separately or in aggregate), there had been any – or any material – breach of natural justice.

Was the claimed raised in an adjudication barred by limitation?

LJR Interiors Ltd v Cooper Construction Ltd

[2023] EWHC 3339 (TCC)

LJR sought summary enforcement of an adjudicator's decision whilst Cooper sought a Part 8 declaration that the adjudicator's decision was void on the ground that the sum awarded was barred by limitation. Back in August 2014, the parties entered into a written contract under which LJR agreed to carry out dry lining and other works for Cooper. The contract contained no provision for the reference of disputes to adjudication, so the adjudication provisions of the scheme applied.

Cooper said that the works under the contract were completed on 19 October 2014. On 31 July 2022, almost eight years after they had finished works under the contract, LJR submitted Application No. 4 in the sum of £3,256.58. While the sum claimed was small, LJR submitted similar applications in July 2022 to Cooper across a number of other contracts. Cooper did not respond and LJR gave notice of adjudication saying that the dispute arose "*on or about 28 August 2022 when the notified sum due was not paid by the final date for payment*". Amongst other adjudication defences, Cooper said that the claim was issued outside the limitation period of six years, in accordance with section 5 of the Limitation Act 1980:

> *"For the avoidance of doubt, the 'cause of action' was either 28 November 2014 when the Respondent failed to pay the sum invoiced for by the Referring Party, or, although denied by the Respondent, on 12 March 2015 when the Respondent issued the email refusing to pay the sum invoiced by the Referring Party and provided its reasons for refusal…".*

The adjudicator addressed the issue of limitation by saying that the general rule in contract was that a cause of action accrued when the breach takes place. The breach alleged here was the failure to make payment of a sum said to be due by the final date for payment, namely 28 August 2022. On that basis, the limitation period had not expired. Section 5 of the Limitation Act 1980 provides that: *"An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued".*

In defence to the enforcement proceedings, Cooper simply relied upon the date of the completion of the works as providing the accrual date for a claim for payment under a contract for those works.

Russen J noted that Application No. 4 was not the typical type of application for payment. Although Cooper had described it as being the basis for a smash and grab adjudication, the judge said that it was: *"perhaps better viewed as a return to an otherwise cold contractual scene long after the time when any appropriate investigations into it might be expected to have concluded".*

The judge referred to the Supreme Court decision in *Aspect v Higgins*, noting that the recognition of a limitation period of six years for the commencement of legal proceedings to enforce an adjudicator's decision provided reason why the decision itself should recognise any limitation defence that operates to defeat the claim advanced under the referred dispute. Otherwise, a contracting party would, through the grafting on of the discrete limitation period which applies to any action to enforce the decision, benefit from a much longer limitation period than the Limitation Act 1980 contemplated for the bringing of legal proceedings. The judge also referred to, and agreed with, a statement in *Keating on Construction Contracts* (11th ed), at para. 16-047, which supported this approach:

> *"The Limitation Act 1980 and other enactments apply equally to adjudication in the sense that an adjudicator must treat the law of limitation as a substantive defence just as any other defence".*

Further, the judge said that:

> *"The key hallmark of a point which may operate to defeat such enforcement on a responsive Part 8 claim … is that it should be one which on a summary judgment application it would be unconscionable to ignore".*

The adjudicator's approach in deciding

that LJR's cause of action, accrued on 28 August 2022, paid no regard to the terms of the contract, as to when the right to payment of the balance sought by Application No. 4 accrued. It further appeared to have assumed that the absence of a pay less notice (taking the limitation defence or any other objection to payment of that sum) meant that it was unnecessary to consider whether the application itself was timely. LJR's right to payment of all sums identified in Application No. 4 was one which accrued on 28 November 2014. The unpaid balance did not somehow become "*due again*" for limitation purposes simply by virtue of being demanded again over 7.5 years later.

Was the final date for payment conditional upon the delivery of a compliant VAT invoice?

Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL)

[2023] EWHC 2243 (TCC)

Lidl and 3CL, an industrial refrigeration and air-conditioning contractor, entered into a framework agreement which enabled the parties to enter into individual works orders, each of which was to constitute a separate contract incorporating both the terms of the framework agreement and the order. Under the contract, 3CL could make applications for interim payment following the achievement of defined milestones. Under AFP19, 3CL sought payment of £781,986.22.

Lidl said that AFP19 was an invalid payment application for a number of reasons, including that it failed to comply with the contract which required: (a) the identification of the milestones achieved, and amounts claimed against each; and (b) the provision of the required supporting photographs and insurance evidence. 3CL said that the requirements were not conditions precedent and, in any event, they had complied with them.

Lidl responded to AF19 by issuing "2011-PAY-7" and valuing the works at nil. 3CL said that this was, in reality, an invalid pay less notice served without a prior payment notice and that the payment terms of the contract as regards the final date for payment did not comply with the requirements of the HGCRA. Lidl said that the contract made the final date for payment conditional upon 3CL delivering a compliant VAT invoice which, Lidl said, 3CL did not do.

An adjudicator rejected Lidl's arguments and awarded 3CL the amount claimed in AFP19. 3CL brought Part 7 summary enforcement proceedings, and Lidl raised their contractual arguments by way of a Part 8 application for declarations. The judge first considered whether there were any genuine defences to summary enforcement of the decision.

The only defence raised was an alleged breach of natural justice. Lidl said that the decision was based in part on an analysis of clause 7.4.2 of the contract, in circumstances where there was no opportunity for making submissions on the point. The relevant part of the decision was made on the basis that the reasonable recipient would have understood PAY-7 to be a pay less notice because: (a) this is what it said it was; and (b) it included a deduction for liquidated damages when under the terms of the contract, including and specifically clause 7.4.2, that deduction ought to be the subject of a pay less notice and not a payment notice. In the referral, 3CL, without referring to clause 7.4.2, had said that one reason why the notice should be read as a payment notice was because it stated that its net value of the works took into account the deduction of liquidated damages ("LDs")which demonstrated that it was, in content, a pay less notice. However, Lidl did not engage with this point. In considering this issue, the judge commented that:

> *"It is fair to say that, in their submissions, the parties primarily indulged in detailed, repetitive and tendentious submission on the relevance of the fact that the notice was repeatedly described by Lidl's representative as a pay less notice. The adjudicator cannot have been assisted by the tenor of these submissions which has, unfortunately, become so endemic in adjudications".*

The judge considered that, although 3CL did not specifically mention clause 7.4.2, given that the referral had specifically raised the point about the notice wrongly deducting and withholding an amount for LDs, there was clearly an issue raised in the adjudication which the adjudicator was entitled to consider. To say that the adjudicator could not even refer to clause 7.4.2 in making this decision simply because it had not been the subject of express reference by either party seemed to the judge to be taking the requirements of natural justice too far in the context of the adjudication procedure.

Looking at PAY-7, the judge commented that it was, in substance, a combined payment notice and pay less notice, specifying 20 reasons for "*withholding payment*", the majority of which were said to be where either the individual milestone had not been fully completed or where it had been completed but was non-compliant through defect or damage, and of the remainder, by far the most significant in monetary terms was the deduction of LDs, in the sum of £765k. The adjudicator was, therefore, right to say that the deduction of LDs in PAY-7 was contrary to the express terms of the contract and to confirm that the notice was in content and substance, as well as in its express description, a pay less notice and not a payment notice.

The judge went on to consider whether the alleged failure by 3CL to comply with the formal requirements of the payment application was a condition precedent rendering the application invalid. The strongest point made by Lidl here was the use of the word *"must"*. This was *"a powerful indication"* that compliance with these requirements was mandatory. However, there were no words in the clause which made it clear that unless each and every one of these requirements was complied with, the payment application would not be an effective payment application and the remaining requirements of the clause would not apply. There was also no compelling reason for requiring compliance to be a condition precedent. Not only was Lidl required to inspect the works within seven days so that Lidl could see for itself whether the milestone had been achieved, but Lidl was only required to issue a payment notice specifying the sum it considered to be due. It was therefore entitled to have regard to any non-compliance in making its valuation.

Further, whilst it was agreed that no photographs were submitted, Lidl had not rejected any of the previous applications on the basis of a lack of photographs. In such circumstances, it was "*plain*" to the judge that any challenge to the validity of AFP19 based on the absence of photographs would fail by application of estoppel by convention.

3CL then submitted that the judge should follow the decision of Cockerill J in *Rochford v Kilhan,* (see *Dispatch*, Issue 243) and hold that the final date for payment provisions were not compliant with the HGCRA. HHJ Davies noted that the judge in *Rochford* had said that the lack of any certainty as to when the due date fell or when the payment certificate should be issued meant that the agreed regime was so deficient that wholesale replacement with the scheme provisions was the only option. While a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism. This made: *"a degree of sense given that it will be important for the payer to be exactly certain how much time he or she has in which to serve a payless notice, the final date for payment being the date which is critical to that step".*

HHJ Davies accepted that these comments were obiter, and so not binding, but the judge said they were also

> *"a careful and a reasoned decision on the law, which was a separate and an independent basis for finding as she did. Accordingly, it cannot simply be disregarded on the basis either that it is obiter…".*

Lidl argued that the final date for payment was conditional on 3CL providing a valid VAT invoice; 3CL argued that this was contrary to the HGCRA.

Here, under the payment schedule the final date for payment was *"either 21 days following the due date or receipt of the Contractor's valid VAT invoice, whichever is the later".* Therefore, the final date for payment might be entirely dependent on the date of 3CL's invoice, which was not, therefore, set solely by reference to or pegged to the due date.

HHJ Davies said that the legislation set a:*"blanket prohibition on party autonomy as regards the ascertainment of the final date for payment save as to the length of the period".* In other words, under s.110(1)(b) of the HGCRA, you cannot link a final date for payment to an event, rather than a particular date.

Indemnity costs and Part 36 offers

Sleaford Building Services Ltd v Isoplus Piping Systems Ltd

[2023] EWHC 969 (TCC)

There were two claims before Mr Alexander Nissen KC. Isoplus sought enforcement of an adjudication decision for some £325k. It was common ground that the decision was valid. Whether judgment should be entered depended on the Part 8 proceedings brought by Sleaford who said that clause 21.4 of the subcontract contained a prerequisite to payment with which Isoplus had not complied, such that Isoplus was not entitled to any further payment:

> *"21.4 The Subcontractor in subcontracting any portion of the subcontract works to a Sub-subcontractor:*

- *procures that the terms of each sub-subcontract are compatible with the terms of this subcontract; and*
- *as a precondition to payment of any sum related to their work provides to the Contractor within 7 days from the earlier of commencement of their work or the execution of the relevant sub-subcontract a certified copy of the sub-subcontract and compatible with the terms of this subcontract (save for particulars of the sub-subcontract sum or fee), together with evidence of the professional indemnity insurance (or where applicable product liability insurance) held by such sub-subcontractor complying with the terms of the sub-subcontract and the requirements of this subcontract".*

Isoplus said that these matters were unsuitable for resolution through Part 8 proceedings. Sleaford had commenced the adjudication alleging that Isoplus had installed incorrect fittings causing a catastrophic failure. The redress sought included asking that the adjudicator if awarding payment to Isoplus:

> *"advises if all pre-requisites for payment have been complied with in respect to insurances and provision of sub-subcontract conditions etc to enable payment to be made without being in breach of the Subcontract".*

In the adjudication, Sleaford said that the sub-subcontracts provided were not compatible with the subcontract, no evidence of insurance had been provided and that, accordingly, no award of payment could be made. Isoplus said that no particulars had been given on either issue. Despite Sleaford having initiated the referral, the adjudicator concluded that £325k was now due to Isoplus. The adjudicator agreed that:

> *"I am satisfied on a balance of probabilities that compliance with clause 21.4 is required as a precondition to payment of any sums related to a sub-subcontractor. Based on the information provided I am not able to confirm whether [Isoplus] have complied with this obligation".*

In written evidence, Isoplus said that it was inconceivable that Sleaford could have been unaware of the involvement of the sub-subcontractors in carrying out a portion of the works between November 2020 and September 2021. Applications for payment were issued during that period. There was no assertion of non-compliance with clause 21.4 and payments were made in full. Sleaford said that it was clear that clause 21.4 was a pre-condition and, on the evidence before the court, Isoplus was incontrovertibly in breach. None of the sub-subcontracts were provided within seven days; the purchase order from at least one sub-subcontract was not certified; and no insurance had been provided for any of the three sub-subcontractors.

The judge noted that it was "*unfortunate*" that Isoplus chose to issue its Part 7 proceedings in Manchester given that the Part 8 claim had already been issued in London. No satisfactory explanation for this was offered by Isoplus. As a result, public resource was needlessly spent resolving the question of where the proceedings would be heard. The judge was clear that the proper approach to these two sets of proceedings was that identified by Coulson LJ in *A&V Building Solutions Ltd v J&B Hopkins Ltd* [2023] EWCA Civ 54:

> *"The proper approach to parallel proceedings was outlined by O'Farrell J in* Structure Consulting Limited v Maroush Food Production Limited *[2017] EWHC 962 (TCC). The judge should usually give judgment on the claim based on the adjudicator's decision and then – to the extent possible – endeavour to sort out the Part 8 proceedings".*

It followed that the judge should first determine whether there was there any defence to the Part 7 claim. It was accepted by Sleaford that the adjudicator's decision was enforceable.

Second, the judge had to consider whether the matters raised were suitable for determination by means of Part 8. Here, the judge was not so satisfied, referring again to the *A&V* case and this time Coulson LJ's comment that:

> *"Warnings have continued to be given as to the over-liberal and inappropriate use of Part 8 in adjudication cases".*

In considering whether sub-clause 21.4 was operable, the judge had to consider whether the requirements of a condition precedent are satisfied. Here, the judge referred to another decision of Coulson J, *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2008] EWHC 2379 (TCC):

> *"It is trite law that, if one party's obligation to do something under a contract is contingent upon the happening of a particular event, the circumstances of the event must be identified unambiguously in the contract. It must be clear beyond doubt how and in what circumstances the relevant obligation has been triggered...".*

Sub-clause 21.4 contained multiple sub-elements within it. Here, it was possible that only some, but not all, of those elements contained conditions precedent. The Part 8 proceedings did not identify, still

less draw, any distinction between the differing elements or allow for individual declarations to be given in respect of them. The multi-faceted elements within clause 21.4 were such that a properly particularised claim should be pleaded out so that each issue of construction can be separately resolved.

Second, it was necessary to consider whether or not Isoplus had, in fact, complied with such conditions precedent as may exist. The failure by Sleaford to have adequately particularised its breaches meant that there was no proper agenda for determination of the matter at this stage. It was also necessary to consider waiver. It was common ground that Sleaford had made at least three payments to Isoplus in respect of milestone achievements. Isoplus said that the making of these payments in full and with knowledge of any non-compliance with clause 21.4 amounted to a unilateral waiver of any preconditions. The judge was satisfied that Isoplus had an arguable case that the payment in this case amounted to a waiver. But a good deal more evidence was required in order to finally determine the matter. Further, valuation evidence would be required because, at present, there was no basis upon which the court could determine what part of any milestone payment related to the work of a given sub-subcontractor in respect of which a breach of clause 21.4 has been proven.

The judge concluded that it would be better for separate proceedings to be issued so that Sleaford could start afresh. The Part 8 claim was dismissed but that did not mean that Sleaford was shut out from advancing the same essential points again.

Was the adjudicator bound by an earlier decision?

Sudlows Ltd v Global Switch Estates 1 Ltd

[2023] EWCA Civ 813

This issue here was that the adjudicator in adjudication number 6 decided that he was bound by the findings in adjudication number 5, which meant that Global were contractually liable for what were termed as "*the cabling and ductwork issues*", and should, as a consequence, pay Sudlows just under £1 million. However, if he had not been bound, the second adjudicator had also said that, based on the information in adjudication 6, he would have come to a different conclusion on the issue of contractual liability, with the result that Sudlows would have had to pay Global in excess of £200k. At first instance, the judge concluded that the later adjudicator had been wrong to find that he was bound by the result in the earlier adjudication and gave judgment in favour of Global. Sudlows appealed.

Adjudication 5 concerned Sudlows' claim for an extension of time ("EOT"). The critical issue was very narrow. There was no dispute that the delay was caused by anything other than the cabling and ductwork issues. There were no other competing relevant events. The only issue was which party was contractually responsible for the cabling and ductwork. Having found that Global was responsible, the adjudicator held that Sudlows were entitled to an EOT of 482 days.

In adjudication 6, described as the continuation of the delay assessed in adjudication 5 flowing from the cabling and ductwork issues, Sudlows sought an additional EOT of 133 days. The referral also contained a full loss and expense claim, amounting to just over £12 million.

Global "*made no bones*" about their dissatisfaction with the previous decision and relied on all the evidence that they had unsuccessfully relied on before. Global also relied on two further short reports which Global said demonstrated that there was nothing wrong (and had never been anything wrong) with the ductwork. The judge below, noted the "*dramatic*" effect of the new material on the second adjudicator. The judge also said that the fact that both adjudications dealt with the same relevant event was "*plainly insufficient*" to mean that, in both adjudications, the dispute was the same or substantially so. They related to underlying EOTs for different periods of time and there were new materials, which were not, and could not have been, part of the dispute leading to the prior adjudication.

Coulson LJ noted that the practice of serial adjudication, involving repeated references of disputes to adjudication under the same contract, is not always easy to reconcile with the emphasis on speed and proportionality. He said: *"Put more shortly, it is harder to adhere to the principle of 'pay now, argue later' when you are constantly arguing now"*. Adjudication is supposed to be a quick, one-off event; it should not be allowed to become a process by which a series of decisions by different people can be sought every time a new issue or a new way of putting a case occurs to one or other of the contracting parties.

The judge thought that there were three over-arching principles to be applied when considering arguments of overlap.

(i) If the parties to a construction contract do engage in serial adjudication, and then inevitably get drawn into debates about whether a particular dispute has already been decided, the need for speed and the importance of at least temporary finality mean that the adjudicator (and, if necessary, the court on enforcement) should be encouraged to give a robust and common-sense answer to the issue.

(ii) You need to look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision. What matters is what it was, in reality, that the adjudicator decided. It is that which cannot be re-adjudicated.

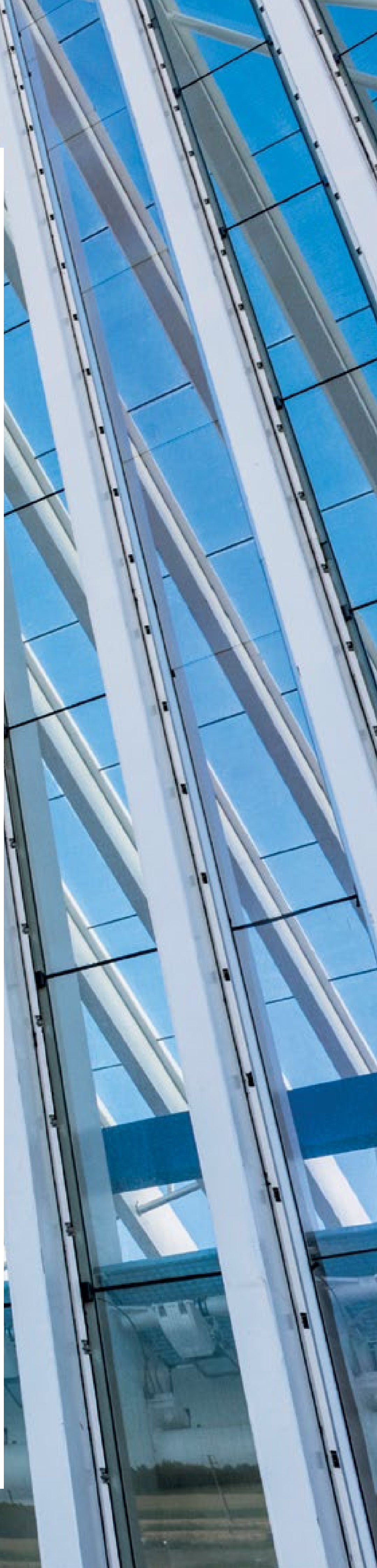
(iii) There is a need for flexibility. That is the purpose of a test of fact and degree. It is to prevent a party from re-adjudicating a claim (or a defence) on which they have unequivocally lost, but to ensure that what is essentially a new claim, or a new defence, is not shut out. The re-adjudication of the same claims, where the only differences were the figures, was impermissible whilst a new, wider claim or defence was permissible, even if it included elements of a claim which had been considered before.

Here, Global said that adjudication 6 concerned a fresh claim for an EOT and an entirely new claim for loss and expense. Coulson LJ noted that the second adjudicator had looked at what had been decided in the previous adjudication, including the essential finding as to Global's contractual responsibility for the cabling and ductwork issues. As this was the same issue that had been referred to him, he concluded that this was sufficient to bind him in respect of the further extension period claimed in adjudication 6. Coulson LJ noted that, on the critical issue of overlap, it was *"important that, in serial adjudications, the policing of this sort of debate is primarily left to the adjudicators themselves. The court should only intervene when something has gone clearly wrong in a later adjudicator's decision".*

This was a very unusual delay case. Typically, arguments about delay range across the alleged effects of different competing relevant events and the consequences of different critical path analyses. But that was not the case here. In both adjudications, it was agreed that there was only one cause of the relevant delay. The first adjudicator's clear view as to Global's contractual responsibility for the cabling and ductwork issues was binding on the parties and binding on any subsequent adjudicator.

It was not correct to suggest that the only binding element of the first decision was the 482-day EOT award and nothing else. That ignored the reality of the decision in adjudication 5. The fact that a different EOT period was claimed in the second adjudication did not make a difference. Nothing else had changed. There were still no other competing relevant events, and no other matters said to be on the critical path. There was no "*new narrative*" at all.

If the second adjudicator was correct to say that he was not entitled to re-investigate the question of contractual responsibility for the cabling and ductwork issues, then the new evidence was irrelevant and inadmissible. It went to an entirely different matter, namely a challenge to the earlier decision. That could only be made in court proceedings or in arbitration. If Global wanted to argue about their contractual responsibility for the cabling and ductwork issues, then they were entitled to do so; but they had to do this later, in court or arbitration. ■



CILL cases

Defective Buildings – Accrual of cause of action in tort for pure economic loss – Defective Premises Act 1972 – Retrospective application of Building Safety Act 2022 – Whether third party claim a prerequisite for a claim under the Civil Liability (Contribution) Act 1978

URS Corporation Ltd v BDW Trading Ltd

[2023] EWCA Civ 772

Court of Appeal;
Before Lady Justice King, Lady Justice Asplin and Lord Justice Coulson;
Judgment delivered 5 July 2023

The facts

BDW Trading Ltd ("BDW"), a housing developer, engaged URS Corporation Ltd ("URS") as consulting engineers in relation to various housing developments including Capital East in the Docklands, London, and Freemens Meadow in Leicester.

The Capital East project consisted of five separate tower blocks ranging from 10 to 18 storeys in height and containing a total of 360 apartments. Practical completion of the development occurred in or around March 2007 to February 2008. The apartments were sold by BDW by way of individual contracts of sale. Although BDW had a head lease, its interest in that head lease was transferred in December 2008.

The Freemens Meadow development comprised seven towers, each of six stories and each containing 32 apartments. Practical completion of those blocks occurred between February 2005 and October 2012. The individual apartments were sold to purchasers on long leases and BDW's freehold interest was transferred on various dates, the last being in May 2015.

The form of appointment between BDW and URS was in a standard form and clause 3.3 set out a warranty on the part of URS that it had performed its duties and would continue to perform duties under the appointment with reasonable skill care and diligence. Clause 3.10 of the appointment required URS to enter into collateral warranties in favour of the first tenant and the first purchaser.

Following the Grenfell Tower disaster, BDW undertook a widespread investigation of its developments. In late 2019, BDW discovered cracking to the structural slab of a building known as "Citiscape" which had been designed by URS. It was discovered that the structural integrity of the slab was seriously deficient and that the building was at risk of impending structural failure. Extensive remedial works were required. As a result of this discovery, BDW undertook a wholesale review of its developments which had been designed by URS. BDW concluded that the structural design for Capital East and Freemens Meadow had been negligently performed and that existing structures were dangerous, although no physical damage had manifested itself in the blocks.

On 6 March 2020, BDW issued proceedings against URS. The claims made were claims for negligence in tort. As no physical damage had occurred the claim was for pure economic loss.

By the time the defects came to light in 2019, BDW no longer owned or had any proprietary interest in the relevant buildings. BDW's position was that, as a responsible developer, they could not ignore the problem once it had come to light. As a result, BDW incurred significant costs in carrying out investigations, temporary works, the excavation of one of the Capital East blocks and permanent remedial works.

In its defence URS argued that BDW had not suffered any actionable damage because BDW had sold the buildings for full value before the problems came to light and/or BDW was not liable to carry out any remedial works and had a complete limitation defence to any claim brought against it by the purchasers of the apartments. On that basis, URS argued that BDW's losses were outside the scope of URS's duty of care.

The parties agreed that there should be a trial of preliminary issues. In particular: (i) whether the scope of URS's duty extended to the losses claimed by BDW; and (ii) the date on which actionable damage occurred and the claim in tort accrued.

In respect of the scope of duty, URS argued that it was necessary to first identify the risk of harm which URS was obliged to protect BDW against and that this risk was harm caused to BDW's proprietary interests in the building and/ or the risk of BDW being exposed to claims brought by those to whom it had sold such proprietary interests (i.e., the individual purchasers). URS argued that neither risk came to fruition because, by the time the effects were discovered, BDW no longer had a proprietary interest in the developments and any claims by third parties were time barred. BDW disagreed, arguing that this was a convoluted approach and that the duty owed by URS was co-existent with the duty owed in contract, namely that the structural design would be produced using reasonable skill and care.

Therefore, the risk that URS had to guard against was the risk that URS's negligent structural design would lead to structural defects and an unsound building. In respect of the date of the cause of action in tort, URS contended that the cause of action accrued when the defects were discovered in 2019, being a date after the buildings were sold. BDW contended that the cause of action accrued at practical completion of the blocks.

The judge at first instance (Fraser J) decided both points in BDW's favour. URS appealed. In June 2022, the Building Safety Act 2022 ("BSA") came into force. Under s.135 of the BSA, the applicable limitation periods for claims under the Defective Premises Act 1972 ("DPA") were extended. BDW therefore sought permission to amend its pleadings to reflect this and to add claims against URS under the DPA and the Civil Liability (Contribution) Act 1978 ("CLCC"). URS opposed the amendments on the basis that: (i) the BSA did not apply where proceedings had been commenced when the Act came into force; (ii) there could be no claim under the DPA because URS did not owe a statutory duty to BDW; and (iii) there could be no claim for contribution because there had been no actual claimsby third parties against BDW. Permission was granted for the amendments and URS appealed that decision.

Issues and findings

Were the losses claimed by BDW within the scope of URS's duty of care?

Yes. The judge was correct in deciding that URS's duty of care should be considered by reference to negligent structural design leading to structural deficiencies or defects rather than by reference to BDW's proprietary interests.

When did the cause of action in tort accrue where there was no physical damage and only economic loss?

The authorities establish that if there is an inherent design defect that does not cause physical damage then, at the latest, the cause of action accrues on completion of the building.

Does the BSA apply where proceedings had already been commenced when the BSA came into force?

Yes. There was no exception in that regard to the retrospectivity of the BSA.

Did URS owe BDW a statutory duty under the DPA?

Yes.

Could BDW bring a claim under the CLCC where no claims by third parties had been raised against it?

Yes.

Commentary

URS set up a cascade of arguments in defence to the claims being made by BDW, none of which were successful. In respect of the accrual of causes of action for negligence claims in tort for pure economic loss, this judgment provides a helpful discussion of all the key cases and summarises the accepted position: that accrual will be considered at the latest as at completion of the works, rather than on discovery of the defect.

The clarification in respect of retrospectivity of the BSA is helpful and also the discussion concerning URS's own liability under the DPA and the rejection of the arguments founded on proprietary interest that URS deployed in this case in a number of different ways.

This is a lengthy judgment covering a myriad of issues and it is worthwhile reading the full judgment (which could not be included here due to space limitations).

Contract interpretation – Limitation of liability clause

Drax Energy Solutions Ltd (formerly Haven Power Ltd) v Wipro Ltd

[2023] EWHC 1342 (TCC)

Technology and Construction Court;
Before Mr Justice Waksman;
Judgment delivered 9 June 2023

The facts

On 20 January 2017, Drax Energy Solutions Ltd ("Drax") engaged Wipro Ltd ("Wipro") under a Master Services Agreement ("MSA") to provide software services, being a new IT system, based on Oracle software, including customer relationship management, billing and smart metering facilities for Drax's business.

Under Sch. 10 of the MSA, the core services were to be provided under six numbered statements of works ("SOW"), with agreed go-live dates for the various SOWs. The parties agreed charges for SOWs 1 to 4. The total SOW charges payable in the first 12 months of the MSA were £7,671,118.

Clause 33.2 of the MSA provided a limitation on liability, namely that, subject to the other sub-clauses of clause 33, Wipro's total liability to Drax would be limited to an amount equivalent to 150% of the charges paid or payable in the preceding 12 months from the date the claim first arose but that if the claim arose in the first contract year then the amount would be calculated as 150% of an estimate of the charges paid and payable for a full 12 months.

The project was not a success and milestones were missed, rearranged, and missed again. On 7 August 2019 Drax terminated the MSA on the basis of alleged repudiatory breach on the part of Wipro.

Drax brought a claim against Wipro alleging that it had to spend very large sums of money to render acceptable the deliverables provided by Wipro. Drax's claim could be subdivided into four separate claims, being (i) the Quality Claim (£9.8 million); (ii) the Delay Claim (£9.7 million); (iii) the Termination Claim (£12 million); and (iv) the Misrepresentation Claim (£31 million, but these losses overlapped those claimed in the first three claims). Wipro counterclaimed £10 million. The total charges made by Wipro under the MSA and which were paid by Drax amounted to £4.9 million.

It was agreed that the parties would have two issues determined as preliminary issues. Firstly, whether clause 33.2 of the MSA provided for a single aggregate cap on Wipro's liability or for multiple caps with a separate financial limit applied to each of Drax's claims. Secondly, if there were multiple caps, what were each of the claims to which the caps applied. For the purpose of the preliminary issues, the parties agreed that the Misrepresentation, Quality, and Delay claims arose in the first year with the Termination claims arising thereafter.

Wipro argued that the charges payable in the first 12 months were £7,671,118 and that 150% of this figure was £11,506,677 and that this was the maximum amount of loss for which Wipro could be made liable in respect of any or all of the claims made against it. Drax argued that the £11.5

million figure was a limit that applied to each and every separate claim. Initially Drax had argued that each item of loss scheduled in its Particulars of Claim constituted a claim. At the preliminary issues hearing, Drax focussed on the argument that there were four claims: the Misrepresentation Claim, the Quality Claims, the Delay Claims, and the Termination Claims.

Issues and findings

Did the MSA provide a single aggregate cap on liability?

Yes.

Commentary

In determining that the cap was an aggregate overall cap on liability the judge undertook a detailed analysis of the wording used in the MSA, taking into account the established legal principles concerning interpretation of contract and limitation clauses. Whilst acknowledging that Drax's argument was one that could be made, the judge concluded that Wipro's interpretation was to be preferred, particularly in light of other provisions in the contract. The judge also made clear that he did not consider that there had been any ambiguity in the drafting even though he did also consider the drafting of the relevant clause to be poor.

Security for costs where claimant is a Project Co SPV in a PFI project

Sheffield Teaching Hospital Foundation Trust v (1) Hadfield Healthcare Partnerships Ltd, (2) Kajima Construction (Europe) Ltd, (3) Veolia Energy & Utility Services UK plc

[2023] EWHC 644 (TCC)

Technology and Construction Court; Before Mrs Justice O'Farrell DBE; Judgment delivered 22 March 2023

The facts

Sheffield Teaching Hospital Foundation Trust ("the Trust") comprises five teaching hospitals including the Northern General Hospital in Sheffield. Hadfield Healthcare Partnerships Ltd ("Hadfield") is a special-purpose vehicle ("SPV") company incorporated in 2004 for the purpose of developing and operating a new ward block at the Northern General Hospital ("the Hadfield Wing") as a PFI project.

By an agreement dated 20 December 2004 ("the Project Agreement"), Hadfield agreed (as Project Co) to design, build, commission and operate the Hadfield Wing. On the same day, Hadfield entered into a contract with Kajima Construction (Europe) Ltd ("Kajima") ("the Construction Contract") pursuant to which Kajima agreed to carry out the design, construction and commissioning of the Hadfield Wing. Also on 20 December 2024, Hadfield entered into an agreement with Veolia Energy & Utility Services UK plc ("Veolia") ("the Hard Services Agreement") whereby Veolia agreed to provide facilities management services from the completion of the construction works.

In 2017 and 2018, the Trust identified potential defects in the fire compartmentation and other fire protection works in the Hadfield Wing. The Trust, Hadfield and Kajima entered into various standstill agreements, and between 2019 and 2021, remedial works were carried out by Kajima and Hadfield.

On 9 December 2020, the Trust commenced legal proceedings against Hadfield seeking damages of approximately £13 million, alleging design and construction defects throughout the Hadfield Wing. On 16 August 2021, Hadfield commenced Part 20 proceedings against Kajima. Kajima denied the claims and argued that the losses alleged by the Trust arose due to maintenance failures on the part of Veolia. On 13 May 2022, Hadfield commenced Part 20 proceedings against Veolia stating that to the extent that Kajima established that the losses incurred were Veolia's responsibility then Hadfield claimed an indemnity or damages against Veolia.

On 22 December 2022, Veolia issued an application for Hadfield to provide security for costs in the sum of £2.6 million in respect of the claim against Veolia. Veolia argued that as Hadfield was an SPV it would not be able to pay Veolia's costs if ordered to do so, which is the threshold test for an order for security for costs. Hadfield argued that the threshold test was not satisfied as whilst it accepted that it would not be able to pay Veolia's costs now it did not necessarily follow that Hadfield would be unable to meet any adverse costs order following the judgment in circumstances where it was simply passing down claims to Veolia.

Issues and findings

Should security for costs be awarded?

Yes.

Commentary

Disputes arising out of PFI projects are not an uncommon occurrence in the TCC and will generally involve the Project Co. It is a feature of the PFI structure that the Project Co is an SPV and it is not difficult to envisage a situation where the Project Co will not, on paper, be able to pay a defendant's costs.

In this case, Hadfield argued that the threshold test was not met because, even though it currently could not meet an order for costs, which would ordinarily mean that the test was met, it was simply passing through claims to Veolia. Thus, if Veolia was successful against Hadfield and obtained a costs order, then this would be in the situation where Hadfield was successful against the Trust and the Trust would likely be ordered to pay the liability for Veolia's costs incurred by Hadfield. The judge rejected this argument on the basis that the case was complex and the likely costs orders at the end of trial were not predictable.

Having determined that the threshold test was met, the judge exercised her discretion in favour of making the relevant order. In the first instance, the evidence that had been provided to support the assertion that such an order would stifle the claim was considered to be lacking. The judge was also influenced by the fact that Hadfield had already funded its costs in the litigation in the sum of approximately £1.6 million and would continue to incur fees through to trial, estimated in the sum of £2 million.

Validity of payment application – JCT Standard Form – whether days means clear days – time of day of issue of payment application

Elements (Europe) Ltd v FK Building Ltd

[2023] EWHC 726 (TCC)

Technology and Construction Court;
Before Mr Justice Constable;
Judgment delivered 30 March 2023

The facts

FK Building Ltd ("FK") as main contractor engaged Elements (Europe) Ltd ("Elements") as subcontractor to carry out remediation works to 312 bi-split apartment modules as part of the design and construction of three buildings at the Uptown Riverside development in Salford. The subcontract incorporated the JCT Standard Building Sub-Contract Conditions SBC Sub/C 2016 Edition with bespoke amendments.

On 21 October 2022, Elements issued its Payment Application No 16 ("the Application") by email timed at 22:07. FK did not issue a payment notice or a pay less notice and accordingly Elements claimed that it was due to be paid the amount claimed in the Application, amounting to circa £4 million. FK disagreed, arguing that the Application had been submitted late and was therefore contractually invalid.

On 5 December 2022, Elements served a notice of adjudication on FK referring the dispute to adjudication. The adjudicator found in Elements' favour and awarded Elements the sum claimed.

On 24 January 2023, FK served Part 8 proceedings on Elements claiming a declaration that the Application was invalid as it had been summitted late. On 3 February 2023, Elements issued enforcement proceedings in respect of the adjudication decision. The two applications were heard together.

In making its arguments, FK relied on clause 4.6.3.1 of the subcontract which provided that any payment application was to be received not later than four days before the interim valuation date for the relevant payment. FK also relied upon the specification which stated that the site working hours were 7:30 to 18:00 Monday to Friday and 8:00 to 13:00 on a Saturday. FK argued that the Application should have been submitted on either 20 October 2022, being four clear days before the interim valuation date (25 October 2022) or alternatively 21 October 2022 and in any event before the close of site working hours. Elements argued that to require the Application to be issued on 20 October 2022 would be to interpret the reference to four days in the subcontract as four clear days and that this was not what the language in the subcontract provides for. Elements also argued that there was no limit on the time of day that the Application could be submitted.

Issues and findings

Should the four days be read as four clear days?

No.

Could the Application be issued after close of working hours?

Yes.

Commentary

In this case, FK argued that Elements' payment application was contractually invalid because it had not been issued within the relevant timescales. It should be noted that it was common ground between the parties that if the judge found that the timescales had been exceeded then the application would be invalid and no obligation to pay would arise.

However, the judge robustly rejected FK's arguments. In respect of the argument that the reference in the subcontract to "four days" should be construed as "four clear days" the judge found that the subcontract could not be sensibly construed in this way. The judge also made clear that there was no restriction on the time of day that a payment application could be issued.

Whether arbitration agreement in existence

Briggs Marine Contractors Ltd v Bakkafrost Scotland Ltd

[2023] CSOH 6

Outer House, Court of Session (Scotland);
Before Lord Braid;
Judgment delivered 2 February 2023

The facts

Bakkafrost Scotland Ltd ("Bakkafrost") owned a Gael Force fish-feed barge which sank off the coast of Portree, Skye, in a storm on or around 26 November 2021, carrying 320-tonnes of fish feed. Briggs Marine Contractors Ltd ("Briggs") was instructed by Bakkafrost to undertake certain initial works to inspect the barge and seal the silo hatches. Briggs carried out that work for which it was paid.

Subsequently on or around 29 April 2022, Bakkafrost and Briggs entered into a Wreck Fixed Contract (the "WFC") for the provision of certain services by Briggs including the recovery of the barge and the disposal of the fish feed. The services were to be provided for a fixed price on a "*no cure, no pay*" basis, namely that Briggs was entitled to payment of the fixed price only in the event the barge was recovered by it. The WFC was subject to English law and clause 17 of the WFC contained an arbitration agreement.

On 28 July 2022, Briggs' divers assessed that the barge was emitting dangerously high levels of hydrogen sulphide such that it became too dangerous for Briggs to continue to provide the services specified in the WFC. Briggs argued that the WFC was frustrated. Briggs alleged that on 15 August 2022, an oral agreement was concluded at a meeting with Bakkafrost whereby it was agreed that Briggs would vent the barge and remove the fish feed and be paid on a cost plus 15% basis.

Briggs argued that the oral agreement was to cover services already undertaken by Briggs since 2 August 2022. Briggs provided services under the oral agreement until 25 August 2022. By that time Briggs had become concerned that Bakkafrost would not agree a written contract reflecting the oral agreement. In particular, Bakkafrost's solicitors wrote to Briggs' solicitors with a draft written agreement which did not reflect the agreed terms, and Briggs alleged this to be repudiatory breach of the oral agreement. Briggs left site and brought court proceedings to recover payment of £532,919.57 for the work carried out on the basis of the oral agreement.

Bakkafrost's position, other than reserving the position on jurisdiction, was that the oral agreement alleged by Briggs was nothing other than an oral variation of the WFC, which remained in place and was not frustrated. Further, the dispute that had arisen was caught by the arbitration clause in the WFC. Accordingly, the court proceedings should be sisted (stayed) for arbitration.

Issues and findings

Was the dispute one that arose out of or in connection with the WFC and therefore had to be sisted (stayed) for arbitration?

Yes.

Commentary

The question before the court was whether the subject matter of the dispute, payment for the services carried out subsequent to the WFC in August 2022, was caught by the arbitration agreement in the WFC. Interestingly, although this was a case heard in the Scottish courts, it was agreed that English law applied.

The arbitration clause stated that it applied to disputes arising "*out of or in connection with*". The judge considered the law on this topic, including the principles that arose in the *Fiona Trust* case (although it was also held that this case was not directly relevant) and concluded on the facts that the arbitration agreement did cover the dispute. He therefore sisted (stayed) the court proceedings to enable arbitration to proceed.

Nuisance – Pure economic loss – Diminution in value of land due to Japanese knotweed encroachment

Marc Christopher Davies v Bridgend County Borough Council

[2023] EWCA Civ 80

Court of Appeal;
Before Lord Justice Baker, Lord Justice Birss and Lord Justice Snowden;
Judgment delivered 3 February 2023

The facts

In 2004, Mr Davies purchased a property in Nant-y-Moel, Bridgend, Wales. The property adjoined land belonging to Bridgend County Council ("the Council") on which Japanese knotweed was growing. The knotweed had encroached from the Council's land onto Mr Davies' land.

Mr Davies brought a claim in nuisance against the Council, which was heard in Swansea County Court, with judgment given in November 2021. The judge found that the Council was in breach of the relevant duty in nuisance owed to the appellant as a neighbour from 2013 to 2018 when a reasonable and effective treatment programme was started.

Mr Davies' claim for damages as a result of the nuisance comprised only sums which could be characterised as aspects of a diminution in value of Mr Davies' property. By the time of trial, the only head of claim still pursued was for the residual diminution in value of the property or "*blight*" remaining even after the knotweed had been treated.

The district judge held that all the diminution in value damages were irrecoverable in law in a case such as this and therefore dismissed the claim.

Mr Davies appealed, arguing that the damages were losses consequential on the nuisance found and were recoverable. The appeal was heard by a circuit judge and dismissed. The circuit judge accepted that the diminution in value claimed was consequential on the nuisance identified but held that there was authority for the proposition that damages for diminution in value due to knotweed were irrecoverable in nuisance, being economic damage or pure economic loss.

Mr Davies appealed to the Court of Appeal.

Issues and findings

Are damages for diminution in value due to knotweed recoverable in nuisance?

Yes. The lower courts had proceeded on a misunderstanding of existing authority. Diminution in value arising from knotweed encroachment is not pure economic loss but is instead founded on the principle that the claimant's quiet enjoyment of the property, or the land's amenity value, has been diminished. For the purposes of the tort of nuisance, that amounts to damage and is the result of physical interference. Accordingly, if consequential residual diminution in value can be proved, damages on that basis can be recovered.

Commentary

In this case, the Court of Appeal has clarified that damages for diminution in value of land as a result of Japanese knotweed encroachment are recoverable and are not pure economic loss. In doing this, the court reviewed the leading authorities and in particular *Williams v National Rail* [2018] BLR 684, which had been relied upon by the lower courts to reject Mr Davies' claim for damages for diminution in value.

The Court of Appeal effectively held that the parts of the judgment in *Williams* relied upon by the lower courts had been taken out of context and the starting point was to consider whether the elements of the tort of nuisance had been made out. Once this was established, then the diminution in value losses were seen to arise as a result of the physical interference to the land, rather than as pure economic loss (being loss without physical damage or physical interference).

Clauses 45.1 and 46 of the IChemE form of contract – Termination losses – Loss of revenue – Financing charges

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others

[2022] EWHC 3275 (TCC)

Technology and Construction Court; Before Mr Justice Pepperall; Judgment delivered 20 December 2022

The facts

By an EPC contract dated 20 November 2015 ("the Contract"), Energy Works (Hull) Ltd ("EWH") engaged MW High Tech Projects UK Ltd ("M+W") to design and construct an energy from waste plant in Hull. The Contract incorporated the IChemE Red Book standard form, as amended by the parties.

The original date for completion was 9 April 2018. The project fell into delay and disputes arose between the parties. On 4 March 2019, EWH terminated M+W's employment under the Contract on the basis of the contractual termination provisions that allowed termination due to the liquidated damages cap having been met and, alternatively, for repudiatory breach.

EWH issued proceedings in the Technology and Construction Court in July 2019 and M+W joined its gasification technology provider, Outotec Inc, to the proceedings. EWH claimed its losses arising as a result of the termination together with costs of rectifying certain alleged defects. M+W counterclaimed on the basis that the termination had been unlawful and that it had incurred losses as a result. Alternatively, it sought to pass down certain of the losses claimed by EWH to Outotec.

EWH's claim amounted to £131 million, of which £53 million related to a claim for financing charges calculated from the date of termination to an assumed completion date (31 March 2021) and representing the additional cost to EWH of servicing the loans that had financed the project as a result of the delayed completion.

The trial of the matter was heard in June and July 2021 and a first judgment covering the main issues in dispute was handed down on 20 December 2022.

Four days before the judgment was handed down, EWH and M+W reached terms of settlement. The judge decided to hand down the judgment in any event not least because the third-party proceedings against Outotec had not been settled and he considered that many of his findings were important to those ongoing proceedings.

At 230 pages, the judgment is lengthy and covers a wide variety of issues including the interpretation of certain IChemE Red Book clauses. This report focuses on three particular findings. The first in relation to whether a contractor can withhold performance and the second and third in relation to the IChemE conditions, as this is not a contract that is regularly considered by the court.

In respect of withholding performance, for the six weeks prior to termination M+W had suspended commissioning.

At trial, M+W argued that EWH was in breach of contract and that, where the contract was silent, M+W was "*unconstrained*" as to how it reacted to that breach subject to the practical limit that if M+W's reaction was so unreasonable as to break the chain of causation then it would be likely that M+W would not be able to recover the time and/or cost consequences of responding in that manner.

In respect of the Contract conditions, M+W argued that there was no general right to recover all losses flowing from the termination but instead that any such claim was limited to losses specified in clause 44.6 of the Contract which, M+W argued, were limited recovery to the costs of completion. This would exclude the financing charges claim.

Finally, M+W argued that the financing charges claim fell to be excluded by operation of clause 45.1(b) of the Contract, which excluded claims for loss of revenue.

Whilst clauses 44.6 and 45.1(b) had been amended by the parties, the parts of the clauses relied upon by M+W comprised the standard form wording.

Issues and findings

Where an employer is in breach of contract, if the contract is silent, can the contractor simply withhold performance?

No. M+W's argument was unsound in English law. It is not the position that, where a contract is silent, a party can respond to the other's breach of contract "*as it sees fit*" and subject only to its response not being unreasonable.

Remedies for breach of contract include damages, specific performance, and termination. Absent some term of the contract to the contrary, the innocent party is not entitled simply to withhold performance of its own obligations whether such course would be reasonable or not.

Does clause 44.6 of the IChemE Red Book limit a claim for termination losses to the costs of completion?

No.

Is a claim for financing charges excluded by operation of clause 45.1(b) of the IChemE Red Book?

No.

Commentary

The judge rejected M+W's argument that it was entitled to suspend performance in response to an alleged breach of the contract on the part of the employer. In reviewing the authorities, the judge confirmed the position that, in English law, certain remedies are available to a party who considers it has suffered a breach of contract and absent clear words to the contrary, suspension of obligations is not one of those remedies. It should also be noted that later in the judgment the judge found that the 11-month delay on the part of M+W to the works coupled with the suspension of the works amounted to a repudiatory breach of contract. Therefore, tempting as it might be to suspend performance, such suspension can have potentially fatal consequences to the contract.

The findings in respect of the IChemE conditions are helpful should there be any lack of clarity as to their meaning. In particular the question of whether a financing charges claim is caught by the loss of revenue exclusion at clause 45.1(b) will be of interest as the IChemE Red Book is used on large infrastructure projects subject to project financing arrangements.

The judge was clear in his opinion that whilst one must consider lost revenue in order to determine the interest that has been lost, the financing charges were not revenue and therefore the claim was not excluded. ■

Authority and intention, and the importance of the underlying contract to co-insurance arrangements

The Fenwick Elliott *Blog*, edited by **Andrew Davies**, began in 2017. Its aim is to provide everyone with short updates on topical legal or other issues in the industry, to share our opinions on a wide variety of subjects, and to engage with you and share thoughts and ideas on these various matters through the comments facility.

In August 2023, **Andrew Jeffcoat** wrote about a Court of Appeal case dealing with co-insurance, reproduced for this year's *Review*.

In the recent Court of Appeal case of *FM Conway Ltd v (1) The Rugby Football Union, (2) Royal and Sun Alliance Insurance plc, and (3) Clark Smith Partnership Ltd* [2023] EWCA Civ 418, the court heard FM Conway Ltd's ("Conway") appeal of a decision by the TCC concerning the "*nature, scope and effect*" of a co-insurance policy arranged in connection with works procured by the Rugby Football Union ("RFU") at Twickenham Stadium prior to the 2015 Rugby World Cup ("World Cup"). Coulson LJ's comprehensive leading judgment addresses the background circumstances, the full first instance judgment, and each of the grounds for appeal in detail.

Background

Clark Smith Partnership ("CSP") was appointed by RFU to design cabling ductwork at Twickenham Stadium Conway as part of pre-World Cup refurbishment works (the "Project"), and Conway was appointed by RFU to install that ductwork. Conway was appointed by RFU under a letter of intent sent by RFU to Conway in June 2012 ("LOI") which, amongst other things, incorporated the terms and conditions of the main contract (importantly in the LOI an expressly referenced, comprehensive and developed contract form based on the JCT SBXQ2011), followed in due course by the JCT SBXQ2011 contract itself, entered into in October 2012 in materially the form referred to in the LOI ("Contract").

Under the Contract, insurance Option C was specified as applicable, meaning that insurance was to be taken out by RFU as Employer. The detailed description at the Option C insurance paragraph C.1 entry included *"a Joint Names Policy in respect of the existing structures ... together with the contents ... for the full cost of repair and replacement of loss or damage due to any of the Specified Perils",* and at paragraph C.2, *"a Joint Names Policy for All Risks Insurance ... for no less than the full reinstatement value of the Works".*

In the TCC there was extensive reference to and analysis of background discussions that were said to have taken place around the extent and nature of the insurance policy that RFU should procure for the Project, with the expectation according to those involved in those discussions being that a comprehensive project insurance policy covering all the contractors was advisable and had been decided on.

The insurance policy that was ultimately taken out, effective from the date on which Conway commenced work under the LOI i.e., prior to the date of the Contract, specified both RFU and certain categories of contractor and engaged parties as co-insured, *"for their respective rights and interests".* Conway was an insured party under the policy by either of two possible descriptive categories set out. The policy covered the ductwork installed by Conway, and expressly referenced JCT insurance Option C as the basis under which it was taken out.

In paragraph 23 of his judgment, Coulson LJ notes that the policy also included a waiver of subrogation rights against any insured party, subject to certain excluded circumstances in which the insurer could enforce subrogation rights – the application of these would be central to the first instance case and the subsequent appeal.

TCC judgment

Due to losses subsequently claimed by RFU for alleged defects in the design and installation of the ductwork, a claim was made under the works insurance policy. The insurer ("RSA") indemnified RFU for the circa £3.3 million cost of replacement of the resultant damaged cables.

There was no argument at first instance or at appeal as to whether or not the policy covered the loss suffered (patently it was covered, as evidenced by RSA paying out to RFU under the policy). Nor was there any argument as to whether or not Conway was co-insured under the policy.

The first instance issue raised by Conway was essentially that if it and RFU were co-insured under the policy, could the cover afforded to each of them be construed as different to the extent and with the result that RSA could validly bring a subrogated claim against Conway to seek to recover the amounts paid out?

This was covered by two preliminary issues: (1) whether or not the insured losses were irrecoverable as between RSA and Conway because of the waiver of subrogation rights or otherwise under the policy or the JCT contract; and (2) if RSA could not recover its insured losses from Conway, did that prevent CSP from claiming civil contribution from Conway.

Ultimately, the judge in the TCC, calling on *"the relevant authorities relating to co-insurance",* concluded that:

1. By reference to the principles of principal and agent, RFU had the authority to obtain cover for Conway and the intention to do so;
2. The terms of the underlying contract – being a combination of the LOI and the Contract – were key to ascertaining the effect of the insurance which was obtained; and
3. Crucially, although the policy insured both RFU and Conway, it did not do so to the same extent in respect of the same risk. That meant that the waiver of subrogation, which extended to matters for which Conway was insured under the policy, did not assist Conway. RSA could therefore bring the subrogated proceedings against Conway.

As that resolved the first preliminary issue, the second did not need to be addressed.

Grounds for appeal and appeal judgment

There were five grounds for the appeal:

1. Did the TCC judge apply the wrong test (when looking to assess and ascertain authority and intention for RFU's taking out of the policy)?
2. The relevance or otherwise of the Contract;
3. Did Conway only have to show authority, not intention?

4. Conway's alternative case as to undisclosed principal; and
5. The correct interpretation of the waiver provision.

Coulson LJ concluded that the first ground was the most significant of the first four, to the extent that *"if Ground 1 fails, so too must Grounds 2, 3 and 4"* as grounds 2, 3 and 4 *"arise out of matters of fact rather than any point of principle"*. At appeal, all four of grounds 1 to 4 failed, for which Coulson LJ set out detailed reasoning, as he noted that although ground 1 *"permeated through Grounds 2, 3 and 4"*, there were complete answers to all four.

Coulson LJ made the point that Conway could have failed on grounds 1 to 4, but still won on ground 5.

Ground 5 – as to whether or not the waiver of subrogation wording prevented RSA from bringing a claim against Conway because it would be a claim concerning an insured loss made against an insured party – was rejected for three reasons, set out at paragraphs 104 to 111 of the judgment. These were:

(i) for reasons of commercial common sense;

(ii) because the submission made in respect of it was contrary to the law; and

(iii) because as a point of principle the policy amounted to insurance of the respective rights and interests of each of the co-insured with the effect that Conway was not insured for its own default so the waiver of subrogation clause could not affect the claim. This final point was identified and highlighted by Coulson LJ as a conclusion with *"a consequence that goes well beyond Ground 5 of [the] appeal"* as it provided:

> *"further support ... for the approach taken by the [first instance] judge ... to consider the scope of the insurance cover by reference to Conway's rights and interests, assessed primarily by reference to the underlying contract".*

Conclusions and reminders from Coulson LJ's judgment

The comprehensive and thorough judgment draws on a wide range of authorities to provide:

1. A useful and succinct distinction between joint insurance policies and composite policies and the legitimacy of differing cover for different insured parties under the same policy;
2. A summary of the importance of the *"contractual scheme"* to identifying and understanding a principal's authority and intention as to the nature, scope and effect of a joint insurance policy taken out under a contract containing obligations to do so; and
3. Briefly, a reminder of the validity and effectiveness of incorporation of a main contract's terms, in this case in particular those relating to insurance, into a letter of intent.

Distinction between joint insurance policies and composite policies and differing cover for different insured parties

This distinction is touched on briefly in Coulson LJ's summary of the law and the relevant authorities that underpin the conclusions reached both at first instance and at appeal. In paragraph 39, the judgment states by reference to the relevant authority:

> *"A joint insurance policy could only exist in respect of joint interests. Where the co-insured had different interests, a policy which named more than one insured was a composite policy. ... The distinction between joint and composite policies has been maintained in subsequent cases".*

As later summarised in paragraph 63, the policy *"was a composite insurance policy, which meant that each co-insured was to be treated as if they had their own policy"*. That allowed for the conclusion that Conway was not an insured party for its own defective work and the waiver of subrogation clause could therefore not prevent RSA's subrogated claim against it.

This is important to understand and bear in mind for parties to construction contracts and other contracts which require joint names insurance policies, as this distinction and the true extent of cover afforded separately to the co-insured parties may otherwise not be fully realised until it becomes more of a live issue.

The importance of the "contractual scheme"

Coulson LJ devoted 13 paragraphs to analyses of the authorities for the centrality of the *"contractual scheme"* to establishing whether or not *"the principal assured ... had express or implied actual authority ... to bind some other party as co-assured"*, and to what extent.

Here, the extent of the authority and of the intention was fundamental, as it dictated and set out whether or not Conway was insured in the way that it hoped to be for the purposes of its appeal. Coulson LJ's judgment concludes in this section with numerous helpful and succinct statements on the *"importance of the underlying contract"*. The point here was that although the insurance policy was taken out by RFU and Conway was co-insured under it, *"the mere fact that A and B are insured under the same policy does not, by itself, mean that A and B are covered for the same loss or cannot make claims against one another"*.

Applying this approach to the facts of the appeal, Coulson LJ upheld the TCC judgment, suggesting that *"where there is an underlying contract ... it would be counter-intuitive if that was not at least the starting point for any consideration of authority and intention."* RFU's obligation under the LOI and the Contract was to *"provide Option C cover, but nothing more"*, rather than one to arrange insurance which *"would be the sole avenue for redress for damage of the kind which occurred"*, for which *"further amendments to the standard JCT contract could have been made so as to provide for that in clear and express terms"*.

The importance of this was highlighted throughout Coulson LJ's judgment, both by reference to the TCC decision and in its own right. As the parties expressly recorded the specifics of the insurance arrangements intended to be put in place via the LOI, including by incorporating into it the terms of the Contract, which was later retrospectively effective, there was no weight to the argument that RFU had or had intended to procure any wider cover to Conway's benefit than the policy it had actually taken out.

Although this is unsurprising to an extent and it seems simplistic to say so, this is a clear reminder that, as a general principle, care should be taken to ensure that agreed terms, and in particular any unique or unusual deviation from a standard contract form, are clearly and unambiguously recorded and included in any contract prior to entering into it.

Incorporation of a main contract's terms into a letter of intent

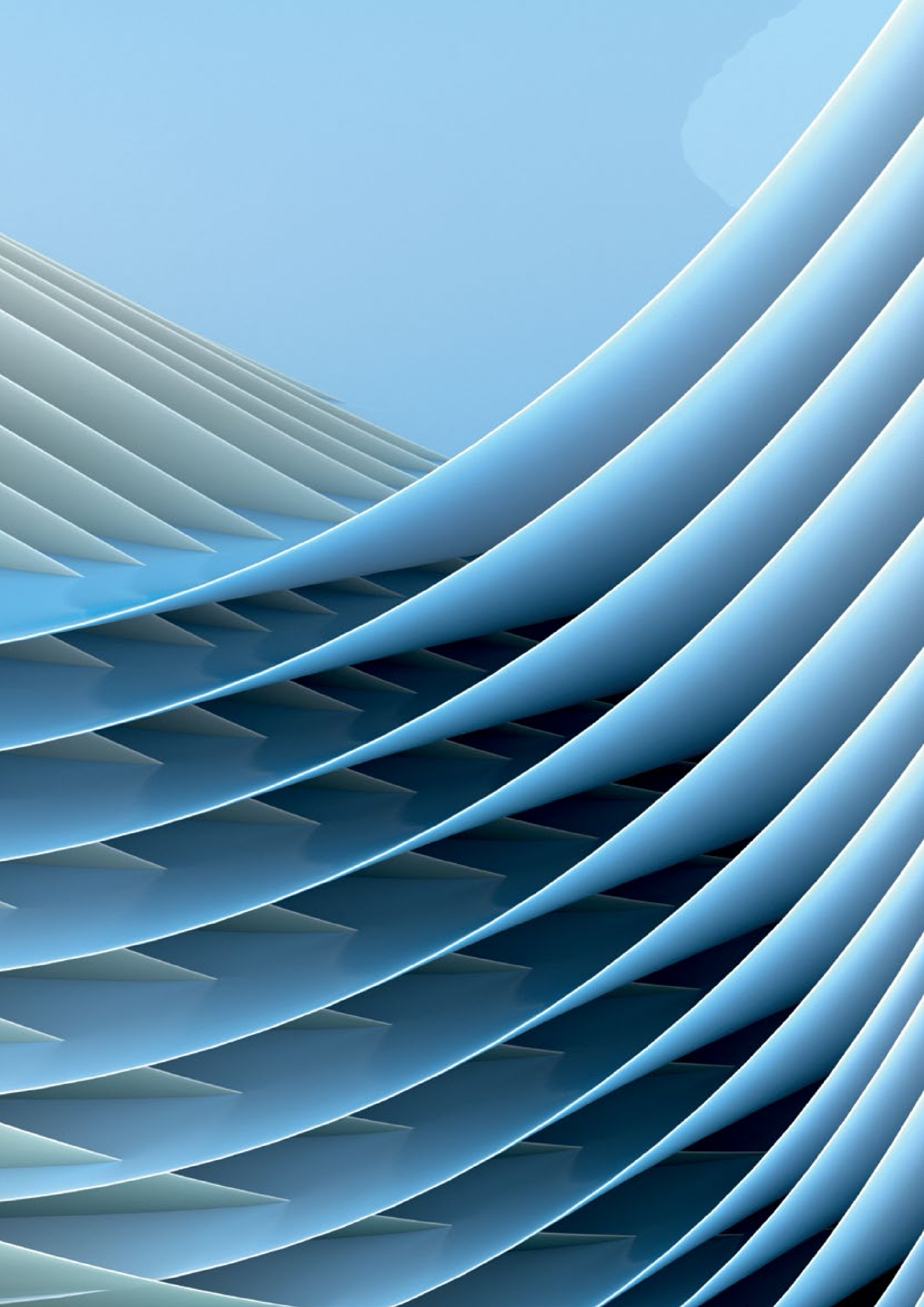
Finally, the contractual arrangements which underpinned the dealings between the parties meant that useful and clear reminders were provided in the judgment as to how and with what effect contractual terms from an intended building contract can be effectively incorporated into a letter of intent, and the retrospective effect of a building contract's terms when it is ultimately entered into.

When summarising the background to the circumstances, Coulson LJ flagged up specific wording of the LOI as effective mechanisms by which the JCT contractual *"terms and conditions ... apply to any work carried out by [Conway] pursuant to ... this letter"*. The validity and effectiveness of this established approach was returned to later in the judgement, as *"the Letter of Intent meant that there was already a binding contract between the parties"* to the extent that the intended insurance arrangements under the Contract when entered into were applicable to the LOI which *"contained all the relevant terms, including Option C"*.

The retrospective effect of the Contract on the insurance obligations of RFU and the contractual arrangements between the parties more generally was described as:

> *"the conventional position: where a detailed building contract is entered into in the identical form that was expressly referred to in the Letter of Intent, the building contract will usually be treated as having retrospective effect, although ultimately that is a matter of construction of the Letter of Intent"*.

In this section of the judgment, a helpful reminder and a neat summary was provided both of the validity of this approach and of the importance, once again, of ensuring that the agreed and intended terms of any contract whether a letter of intent or otherwise are accurately and precisely set out within it. ■



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