



**FENWICK  
ELLIOTT**

The construction &  
energy law specialists

## **Annual Review** 2024/2025

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



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December 2024

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Jeremy Glover  
Partner, Editor

Welcome to the 28th 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 56-65, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter *Dispatch* as well as the *CILL*.

This year our *Review* begins with Simon Tolson, on pages 7-8, reflecting on his role as a Commissioner with *Building Magazine*, participating in the Building the Future Think Tank which focused on some of the main significant challenges within the construction sector including AI and digital construction, implementing net zero, building safety, and people and skills. He provides some thought-provoking commentary on the impact of ESG strategies on the construction industry.

Our *Review* builds on these themes. Lyndon Smith then, at pages 40-41, considers the key issues that need to be considered in the construction of data centres, which are themselves increasingly reliant on sustainable practices. Edward Foyle then, at pages 42-43, discusses the impact of the creation of a new 'Great British Energy' by the new Labour government, which will receive £8.3 billion of government investment in the next five years. The focus on Great British Energy emphasises this government's transition towards green solutions in construction. Oliver Weisemann and Edward Foyle, at pages 44-45, consider whether EPCM contracts are suitable for managing complex energy projects, especially in the transition to renewable energy.

Stacy Sinclair at pages 46-49 looks at the ongoing impact of AI. Her article includes a summary (slightly scarily written by AI) of

the recent TECSA Conference on AI & Construction Law, which Stacy helped to organise in October 2024. Just eight days earlier, the first Conflict Avoidance Coalition Conference took place at Portcullis House, at the Houses of Parliament, a conference I had helped to organise. The conference was attended by a wide range of individuals across the construction industry including contractors, subcontractors and suppliers, as well as representatives from the Cabinet Office, Environment Agency, TfL and the Houses of Parliament Restoration & Renewal group. You can find out more at pages 38-39.

In almost every PFI and PPP project, the principal contracts will include bespoke dispute resolution procedures, which typically provide mechanisms for sequential and escalating processes and the determination of what are usually characterised as "related disputes". However, as Ted Lowery explains, at pages 25-26, these mechanisms are not always straightforward.

We have included a special "pull-out" section within the heart of the *Review*, focusing on international arbitration. This can be found at pages 27-37.

Katherine Butler discusses, at pages 28-29, the impact of matters concerning state immunity on the registration of arbitral awards related to the International Centre for Settlement of Investment Disputes. Shahed Ahmed and Leonie Sellars, at pages 30-31, look at the introduction of the arbitrateAD Rules in the UAE, which signify a growing trend towards resolving disputes through arbitration. Sana Mahmud considers, at pages 32-33, the 7th Edition of the SIAC Rules. To round out the section, at pages 34-36, Giuseppe Franco and Freddy Ashe take a closer look at the *Churchill* case in the Court of Appeal at the end of 2023, which led to a number of interesting developments in mediation. They add a continental flavour by comparing the approach to mediation in Italy.

Amongst the changes introduced by the Building Safety Act 2022 was the introduction of building liability orders aimed at restricting the practice of setting up "special purpose vehicles" to carry out developments which were subsequently wound up following completion. As Huw Wilkins explains at pages 11-12, these new orders are intended to enable the High Court to "pierce this corporate veil". Ensuring that responsible parties are held accountable is essential for maintaining industry integrity.

The insolvency of ISG was a sharp reminder that contractors and

subcontractors need to be paid – and paid on time. Late payment is common whether the employer cannot, or will not, release the cash. At pages 9-10, Lucinda Robinson asks: what can a contractor do if it is not paid on time?

Our Fenwick Elliott Blog, edited by Andrew Davies, remains a popular feature of our website, featuring a wide range of short thought leadership and more traditional in-depth reviews of key issues. In September 2024, Paul Smylie wrote about an appeal dealing with termination under the JCT standard form. You can find that at pages 66-67.

As always, adjudication remains a focus of our *Reviews*, with four articles between pages 14-24. George Boddy looks at an unusual enforcement case, when a party suggested that the adjudicator's decision had been procured fraudulently. Katherine Butler and Ava Solouk look at what happens when the court has to consider whether particular contracts are covered by the adjudication legislation. Sonia Ginders takes a detailed look at the various issues arising from serial adjudication. And finally, Philip Barnes reviews the process for serving the referral, the key document which sets out the detail of your claim.

Unforeseen ground conditions remain an ever-present risk in most construction projects, and the clauses allocating such risk are usually amongst the most negotiated provisions in any contract. As a founder member of the JCT Young Professionals Group, Mark Pantry is perfectly placed to discuss, at page 13, whether the publication of the JCT Design and Build Contract, 2024 changed the perceived standard position in favour of the contractor.

Finally, at pages 68-71, our *Review* ends with a tribute to Jon Miller, who passed away in September after a very short illness. Jon's passion, determination and good humour are much missed. Jon affected significant change in the construction industry at some of its most transformative moments, including during the COVID-19 pandemic, when he worked with the Construction Leadership Council providing guidance for contractors. He also provided a series of notes discussing the impact of COVID-19. Being Jon, they were packed with sound practical advice. In his memory, we set out his Note from May 2020.

Our website ([www.fenwickelliott.com](http://www.fenwickelliott.com)) keeps track of our latest legal updates or you can follow us on 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](mailto:jglover@fenwickelliott.com).

**Jeremy Glover**



Simon Tolson  
Senior Partner

I must start with an important reflection upon our dear partner and colleague, Jon Miller, who we lost on 2 September 2024. Jon was an extremely talented lawyer, friend and a key mentor to many trainees and junior lawyers in the firm and is very sadly missed.

We extend our sincerest condolences to Jon’s wife, Eve, and daughter, Chloe. Many of you attended either Jon’s funeral, which was an extraordinarily uplifting celebration of Jon’s life, or the Memorial Service, which was held on 26 November 2024 at the Temple Church in dedication to Jon.

**Changing of the guard**

As already announced, at the end of next March 2025, I stand down as senior partner. We are all delighted Karen Gidwani will take on this roll; I wish Karen every success and know she will be simply excellent in leading the firm into its next phase. Tony Francis and Richard Smellie will remain in their senior positions alongside Karen.

I myself will also continue to be a partner from April 2025 for the next couple of years; such is my love for what I do and this fabulous firm. ■



Karen Gidwani  
Senior Partner-Elect

It is an honour to have been given the opportunity to take the role of senior partner in the firm, and I am excited and looking forward to leading and working with our incredibly talented team across London and Dubai to continue our growth, excellence and development of talent.

I am exceptionally proud of the firm and its culture and what it has achieved, and am keen to continue that going forwards. When I joined Fenwick Elliott, we were one-third of the size that we are now and based only in London. In the past 24 years I have seen the firm grow and go from strength to strength under the guidance and leadership of Simon as well as the strong and supportive senior management team.

Simon has been an exemplary leader of Fenwick Elliott and will always be a hugely respected and admired member of the firm, the legal profession and the construction & energy industries. I can only thank him for his boundless energy in making Fenwick Elliott what it is today and I am delighted that he will continue as a partner at Fenwick Elliott. I know that everyone associated with the firm will benefit from his experience and expertise.

Looking to the future, the legal world is changing, particularly in the sphere of AI and assistive technology. It has always been the Fenwick Elliott way to innovate, and this area is no exception. I am particularly looking forward to working with our Head of Innovation & Technology, Dr Stacy Sinclair, and our clients to develop solutions in this field.

Fenwick Elliott has many strengths, and we remain the go-to law firm for construction & energy law and international arbitration. We also strive to provide the highest quality thought leadership and it is therefore with great pleasure that I am also able to introduce this year’s *Annual Review*, which as ever contains contributions from across the firm. These cover a diverse range of topics from the impact of ESG strategies on the construction industry to alleged fraud in adjudication to the old chestnut of unforeseen ground conditions and, of course, a round-up of the most important cases reported in the last year.

Enjoy reading! ■

## The view from the Building the Future Think Tank

**Simon Tolson** has, in 2024, again had the honour of engaging as a Commissioner with *Building Magazine* following the highly successful Building the Future Commission<sup>1</sup> reports, and this year participating in the Building the Future Think Tank<sup>2</sup> which investigated thought-provoking ideas aimed at reshaping the built environment. The Think Tank considered the significant challenges within the construction sector and the broader built environment, and aims to produce in-depth research and reports for the industry. For 2024, the focus has been on five key areas: AI and digital construction, implementing net zero, workplace and productivity, building safety, and people and skills.

1. <https://www.building.co.uk/building-the-future/building-the-future-commission>
2. <https://www.building.co.uk/building-the-future>
3. See <https://global.lockton.com/gb/en/news-insights/biodiversity-net-gain-what-is-it-and-how-will-it-affect-your-business> by Ben Smith and Oliver Weismann.
4. Morningstar Inc.
5. Things like Building Regulations Part L address energy efficiency in new homes, extensions and commercial buildings in England, mandating a 31% improvement in carbon emissions as of 15 June 2022. They amount to a crucial step toward achieving a 75-80% carbon reduction by the Future Homes Standard in 2025, aiming to enhance energy efficiency, reduce costs, and promote environmental sustainability.
6. Since 1 July 2024, RICS members must follow the 2nd edition of the whole life carbon assessment ("WLCA") standard's requirements when completing a WLCA and record any deviations from the standard, as part of the assessment.

A critical topic emerging from the discussions was the pressing need for educational reforms in the construction industry. To address the growing skills gap, a strategic investment in aligning education with industry demands is essential. At Fenwick Elliott, we actively support the Construction Youth Trust, nurturing young talent and motivating them to pursue careers in construction.

In that context, I am compelled to say that ESG – Environmental, Social, and Governance – strategies are impacting property development in London, much of Europe and, increasingly, the construction industry worldwide. Companies are progressively adopting sustainable practices to reduce their environmental footprint, influenced by stricter regulations and growing investor expectations for responsible operations. As public awareness of social and environmental issues rises, construction firms prioritising ESG are often better received, win work and can enhance their reputation, ultimately reshaping how projects are planned and executed. Something we in Fenwick Elliott take seriously, too.

ESG is transforming how properties are built and managed. Investors and the public are demanding that businesses prioritise these measures. Recent trends include the adoption of green building certifications (like BREEAM, LEED, WELL and DGNB), along with a push for renewable energy in new developments. Legislation such as Biodiversity Net Gain<sup>3</sup> is encouraging the creation of green spaces in urban areas. This shift not only benefits the environment but also enhances the wellbeing of residents and adds value to properties.

Corporate sustainability, as I am sure you know, is an approach to conducting business that creates sustainable, long-term shareholder, employee, consumer and societal value by pursuing responsible environmental aims.

In 2023 to 2024, emphasis was largely on the rapid development of ESG regulations worldwide. Looking ahead to 2025, policymakers and regulators need to shift their focus towards implementing and enforcing these new rules. This will include efforts related to transition finance (financial support that helps decarbonise high-emitting

activities) and the establishment of transition plans. Significant attention on how disclosure regimes will operate globally raises important questions about their practical implications for businesses.

A business's reputation and past behaviours significantly shape expectations for its current and future conduct, especially regarding ESG practices. A strong reputation can lead to competitive advantages and higher pricing potential, but it also risks reputational damage, which can decrease market value. Research<sup>4</sup> indicates that investors prefer genuine ESG initiatives, like net zero commitments and broad diversity, while misleading claims, such as greenwashing, can damage reputations.

The integration of ESG clauses into standard construction agreements represents a significant leap towards a more sustainable and responsible industry. We are seeing sustainability regulations and best practices increasingly influencing contracts and contractor practices. Legal changes aimed at achieving net zero goals will likely require that contracts explicitly incorporate sustainability benchmarks,<sup>5</sup> altering project execution and risk management. Integrated sustainable design, ensures that aspects such as whole life carbon ("WLC") analysis and standardised energy calculations and the like, collaborate with the design brief. This approach aims to deliver projects within budget and on schedule. Yet, as buildings become more complex and require extensive analysis to meet low impact targets, MEP and building services companies often fall short which leaves architects and D&B contractors frustrated with the sustainability workload. Firms that integrate building performance and services design alongside architectural expertise will likely see increased success. Local authorities across the UK will increasingly adopt WLC methodologies<sup>6</sup> as part of their planning application process to prove minimal material carbon impact in developments.

Increased collaboration among stakeholders (architects, contractors, developers, policymakers and communities) will be a key driver of sustainable construction.

As we stand on the brink of 2025, the landscape of construction law is undergoing significant transformations, shaped by advancements in technology, evolving business and societal expectations, and an increasingly complex regulatory environment.

These shifts are influencing the legal practices that govern disputes and construction projects, the relationships among stakeholders, and the mechanisms for resolving disputes. In this frontispiece, I briefly explore key trends poised to redefine the field.

### **1. Integration of technology and legal practice**

Building Information Modelling, blockchain-enabled smart contracts and artificial intelligence, used properly, will not only enhance project efficiency but also revolutionise the legal frameworks that support construction projects. Traceable, immutable and secure smart contracts, underpinned by blockchain technology, will automate many contractual obligations and conditions, reducing the margin for disputes and streamlining compliance and payment processes with the benefits of decentralisation, verifiability and tamper proofness.

Fee earners will find themselves collaborating with technology experts to ensure that contracts are written in a manner that accounts for automated processes. Drones and Internet of Things devices are and will provide real-time data, making compliance monitoring more accessible and transparent. This integration means that construction lawyers will need to cultivate technological literacy to advise clients effectively and remain competitive in the industry, and it is not unlikely a few less lawyers may be needed as processes are made more efficient by technological innovations.

### **2. The rise of sustainability and green building practices**

With a growing emphasis on environmental stewardship, sustainability has become a focal point in construction law contracts as already alluded. By 2025, we expect to see comprehensive regulations that promote green building practices and address the impact of climate change. Construction lawyers are playing a pivotal role in navigating these new regulations, helping clients

comply with increasingly stringent building codes, emissions standards, and sustainable practices.

Furthermore, emerging legal frameworks surrounding carbon neutrality and renewable resource utilisation necessitate innovative contracting strategies. Lawyers will be tasked with drafting agreements that incentivise sustainable practices, facilitate eco-friendly financing, and ensure adherence to evolving governmental mandates aimed at reducing carbon footprints. As a result, the demand for specialised knowledge in environmental law will grow, creating opportunities for legal practitioners in this critical area.

### **3. Evolving risk management paradigms**

The construction industry is inherently risk laden. As we progress through 2025, the approach to risk management will have evolved yet again. The adoption of predictive analytics and risk assessment technologies will allow stakeholders to foresee potential issues before they materialise, leading to more proactive risk management strategies. We will work closely with risk management professionals to develop legal strategies that account for these predictive insights.

Moreover, as contracts evolve to incorporate new technologies, legal frameworks around liability for unforeseen circumstances will become pertinent issues. We need to balance traditional contract law principles with innovative risk allocation provisions that are fair and equitable. The challenge lies in drafting clear, enforceable contracts that legitimately assign risks while promoting collaboration rather than confrontation among stakeholders.

### **4. Enhanced focus on dispute resolution**

As projects become more complex and stakeholder interactions more interconnected, traditional litigation often proves to be distracting, inefficient and costly. A marked shift towards Alternative Dispute Resolution methodologies continues to be the preferred means of resolving construction disputes. These approaches not only provide cost-effective resolutions but also foster a spirit of collaboration, conducive to preserving business relationships.

### **5. Globalisation of construction law**

The construction industry will continue to globalise, connecting stakeholders across borders and facilitating international projects. As this trend accelerates, we find ourselves navigating a myriad of legal regimes and cultural considerations. The ability to understand and reconcile varying laws, standards and practices is an essential conflict of laws skill.

The future of construction law in 2025 is not merely a continuation of the past; it represents a dynamic evolution influenced by technology, sustainability, risk management and increasing globalisation. Legal professionals in this arena must embrace change, develop new competencies and foster a spirit of collaboration to successfully navigate an increasingly complex and interconnected world. As these trends unfold, the role of construction lawyers will become more critical, shaping the foundations of a sustainable, innovative construction industry for years to come.

I think you will agree the articles in this Review illustrate that the construction landscape is rapidly evolving in response to climate change and sustainability, and national and international requirements. Exciting times! Fenwick Elliott is here to help. ■

# Paid late? Choose your weapon.

ISG's devastating demise is a sharp reminder that contractors and subcontractors need to be paid, and paid on time. Late payment is common whether the employer cannot, or will not, release the cash. So, asks **Lucinda Robinson**, what can a contractor do if it is not paid on time?

Contractors have a “*whole battery of weapons*” available to help them, said one employer (Hexagon) in a recent battle with its contractor (Providence) in the Court of Appeal,<sup>1</sup> listing interest, the right to suspend and adjudication as just three firearms a contractor could use to force the employer to pay. Another weapon in the contractor's arsenal, included in many contracts, is termination for repeated late payments. This is potentially a good tactical choice for a contractor frustrated at repeatedly being paid late, or looking to extricate itself from a difficult contract, and, as the Court of Appeal found in *Providence v Hexagon*, it is easier to use than might be expected. Termination is quite an extreme remedy, though, so it is worth assessing the firepower of all these weapons before detonating that bomb.

## 1. Interest

Contractors are entitled to interest for late payment. Usually, the contract will provide for this and set a contractual rate. For example, the standard proposed rate in JCT contracts is 5%, and in NEC contracts it is 3%.

If the contractual rate is not a “*substantial remedy*”, it will be void and the Late Payment of Commercial Debts (Interest) Act 1998 will imply a rate, currently 8% over the official dealing rate per annum.<sup>2</sup> The official dealing rate of the Bank of England on 13 September 2024 was 5%, meaning the applicable rate was then 13%. The alternative contractual rate does not have to be this high to be a “*substantial remedy*”. It must be enough to both deter and compensate for late payment and provide a fair and reasonable alternative to the statutory position.

So how low must the rate fall to be ousted by the Late Payment Act? In *Yuanda v Gear*<sup>3</sup> the judge considered that 5% over base was high enough, but 0.5% was not, and indicated that somewhere between 3% and 4% above base might be sufficient, particularly if negotiated, following which 3% above base was approved in *Kennel Club v Micro-ID*.<sup>4</sup>

Then, in September 2024, 2% above base was rejected as too low in *A&V Building v Hopkins*.<sup>5</sup> The decision was influenced by the inequality of bargaining position, use of the contractor's standard terms and application of the 2% above base cap only to what the subcontractor could recover leaving the contractor able to claim the higher statutory rate. Consequently, a rate less than 3% could

be open to challenge. The right to interest is an important one and may come in useful (especially if interest accrues to a significant amount or in combination with other claims), but contractors will need to take the initiative and claim the interest owed, because it is unlikely an employer will pay of its own volition.

## 2. Statutory Right to Suspend

Another option for an unpaid contractor is to put down tools and stop work temporarily. A right to suspend for non-payment is enshrined in the Housing Grants Construction and Regeneration Act 1996, s.112(1). The contractor must give seven days' notice of its intention to suspend and the right to suspend ceases as soon as payment is made. Suspending contractors are entitled to an extension of time and their reasonable costs and expenses, which means they will not shoot themselves in the foot when exercising the statutory right to suspend.

It is not possible to contract out of this right, so standard form contracts write it in. For example, JCT DB 2016 clause 4.11.1 states:

*“If the Employer fails to pay a sum payable to the Contractor in accordance with clause 4.9 (together with any VAT properly chargeable in respect of that payment) by the final date for payment and the failure continues for 7 days after the Contractor has given notice to the Employer of his intention to suspend the performance of his obligations under the Contract and the grounds for such suspension, the Contractor, without affecting his other rights and remedies, may suspend performance of any or all of his obligations until payment is made in full”.*

Any such suspension is a Relevant Event entitling the contractor to an extension of time (clause 2.26.5) and is also compensated for in cash (clause 4.11.2).

NEC4 includes the right to suspend by referencing back to the HGCRA in Y2.5, where it states that the exercise of this right by the contractor is a compensation event. The contractor must follow the compensation event process to obtain its time and money.

Suspension can be used very effectively. Even a notice of intention can work as a shot across the bows making the actual suspension unnecessary. If the suspension is implemented, it undoubtedly puts pressure on an employer seeking

1. *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA Civ 962

2. Late Payment of Commercial Debts (Rate of Interest) (no. 2) Order 1998

3. *Yuanda (UK) Co Ltd v VW Gear Construction Ltd* [2010] EWHC 720 (TCC)

4. *The Kennel Club Ltd v Micro-ID Ltd* [2019] EWHC 1639

5. *A & V Building Solution Ltd v J & B Hopkins Ltd* [2024] EWHC 2295 (TCC)

6. *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] 1 Lloyd's Rep. 599

completion sooner rather than later and allows the contractor to put a brake on at least some of its costs. Logistically, however, suspension is not necessarily straightforward; there is a supply chain and orders to manage, and recovery of all costs, including overheads and profit, is unlikely. Furthermore, it still allows employers to have extended payment terms, because the employer can withhold payment until the first notice is issued and then for another six days before the suspension takes effect. That cycle could repeat indefinitely.

### 3. Claims

The claims artillery at a contractor's disposal includes statutory demands, court claims and adjudication.

1. Issuing a statutory demand is the first step towards a winding-up petition, so it packs a punch. The threat of insolvency can prompt a quick payment and push the contractor up to the front of the queue for payment.
2. Issuing a claim for payment of an invoice can also trigger payment, because it can be difficult to defend if there is no dispute over the amount due.
3. Adjudication is another option; quicker than a claim in court and assuming the sum to be paid is not contested, it should be relatively straightforward.

All these assaults may push the employer to pay before any decision is reached, but none of them cures the late payment itself, certainly not quickly or easily. The employer will still have had longer to pay (so the contractor should ensure its claim also includes interest), and the contractor will have incurred the significant costs of its legal action. Nor do these options provide an exit route for a contractor continually messed around by a late-paying employer.

### 4. Termination

Termination can be an attractive option for contractors looking to escape a project where the employer repeatedly pays late or where there are concerns about the employer's long-term solvency. Termination should never be undertaken lightly or without advice, because termination on illegitimate grounds or a failure to follow procedure could put the contractor in repudiatory breach, allowing the employer to terminate and claim damages. Nevertheless, termination can be an effective solution.

There is a common law right to

terminate for a breach that is so serious it goes to the heart of the contract. Does late payment fall into this category? Payment is the entire point of a contract for a contractor, but late payment is different to no payment, and if the contractor is still paid and can claim interest, the purpose of the contract is still fulfilled. Consequently, it is unlikely that one late payment will justify a common law termination, but what if there is a repeated pattern of late payment?

In *Dalkia v Celtech*,<sup>6</sup> Dalkia tried to terminate when three consecutive instalments were missed. The court decided that paying a total of £350,000 late, out of £15 million to be paid over a 15-year contract, was not repudiatory but it was material (there is a distinction). The contract permitted immediate termination for a material breach, so Dalkia's contractual termination was upheld.

JCT DB 2016 and NEC4 allow termination specifically for late payment, so materiality is not relevant. Under NEC4, there is no need for a warning before the assault is carried out. Clause 90.4 states:

*"the Contractor may terminate if the Client has not paid an amount due under the contract within thirteen weeks of the date that the Contractor should have been paid"*.

Whilst the clarity is useful, a cynic might say the employer can get away with paying every instalment almost 13 weeks late.

JCT DB 2016 tackles this differently. The contractor must first fire a warning shot by notifying its intention ("Notice 1"). Then, if the employer does not rectify the situation within seven days, the contractor can terminate by notice ("Notice 2"). A quick-firing contractor can thereby put the employer under more immediate pressure and reduce any extended payment terms to just seven days.

In *Providence v Hexagon*, Providence (the contractor) was a sharp-shooter and issued Notice 1 immediately when the date for payment passed. Hexagon paid before Notice 1 expired, so Notice 2 was never issued. A few months later, Hexagon defaulted again. Providence lost patience. Instead of issuing another Notice 1 and re-setting the clock (as Hexagon said it should have done), Providence terminated in reliance on its original Notice 1 and clause 8.9.4, which said:

*"If the Contractor for any reason does not give the further notice referred to in clause 8.9.3 [Notice 2], but (whether previously repeated or not):*

*.1 the Employer repeats a specified default ...*

*then, upon or within 28 days after such repetition, the Contractor may by notice ['Notice 3'] to the Employer terminate the Contractor's employment under this Contract"*.

Providence said this meant Notice 1 was still standing; Hexagon had repeated the specified default (late payment), so Providence could terminate. The Court agreed. Whilst the commercial positions of both parties were argued and considered, it was the interpretation of the language used in clause 8.9.4 that determined the case. The phrase "for any reason" was wide enough to include the employer paying up, so when the Hexagon failed to pay again, Providence terminated immediately.

Employers, beware! Contractors do not have to tolerate repeated late payments. Provided Notice 1 was issued, even if a subsequent late payment is small in amount, or the defaults are months apart, under clause 8.9.3 of JCT DB 2016, the contractor can walk away.

### Final word

Contractors do have an arsenal of weapons to use against employers paying late, but it will not always be realistic to engage them. When plotting their strategy and tactics, contractors should start by identifying the contractual and statutory ammunition at their disposal, then move on to consider the strength of force they want to unleash and the collateral damage it may cause in terms of cost, time and relationships. In the fiercest of battles, suspension and termination may win the war. ■

## Building Liability Orders: when will it be just and equitable to pierce the corporate veil?

It has been (and, indeed, still is) common practice for developers to set up “special purpose vehicles” to carry out developments which were subsequently wound up following completion, thereby allowing their parent companies to avoid long-term liability for any defective works in the development. Amongst the changes brought in under the Building Safety Act 2022 (“BSA”) was the introduction of building liability orders<sup>1</sup> (“BLOs”) aimed at restricting the benefits of this common practice. In short, as **Huw Wilkins** explains, BLOs effectively enable the High Court to “pierce the corporate veil”. However, the High Court can only make such an order if it considers it “just and equitable” to do so, although the BSA does not provide any guidance as to the application of that test.

A company is treated as a separate legal entity which is the sole beneficiary of credit it is owed, and is solely responsible for its liabilities. As a general principle, shareholders, directors and employees cannot be bound by the rights and duties of a company. This has traditionally been referred to as the “corporate veil” separating the legal entity and its shareholders, directors and employees. In common law, the corporate veil can only be “pierced”<sup>2</sup> in very limited circumstances.

The provision of the BSA introducing BLOs came into force in June 2022. Almost two years later, in 2024, we have seen the first two relevant judgments. *Willmott Dixon Construction Limited v Prater & Ors*<sup>3</sup> addresses when a party can apply for a building liability order. The second judgment, *Triathlon Homes LLP v Stratford Village Development Partnership & Ors*,<sup>4</sup> whilst not in respect of building liability orders directly, provides some guidance on the “just and equitable” test.

### When can a party apply for a BLO?

In *Prater*, the main contractor (Willmott Dixon Construction Limited, which has settled a claim by the building owner) is claiming over £46 million from a number of defendants.<sup>5</sup> One of those defendants (Aecom) alleged that after the claim against Prater had been intimated, two of its co-defendants (Prater and its parent company, Lindner Exteriors Holding Limited) divested themselves of their assets, transferring them to three other companies within the same group of companies – Aecom’s concern being that if those companies couldn’t satisfy their share of any judgment, then Aecom would have to make up at least some of the shortfall. Aecom, therefore, made an additional claim for a BLO against those companies (the “BLO Claim”).<sup>6</sup>

The Lindner Companies applied for a stay of the BLO Claim, on the basis that it is wholly contingent on findings of liability in the main proceedings, and that if Prater or Lindner were to pay the amount of any relevant judgment against them, the need for a BLO would never arise. They argued that the BLO Claim should be heard separately, if it ever needed to be heard, after judgment in the main claim (which we expect to be sometime in 2025).

The Court held that the BLO claim should be heard at the same time as the main claim.

- The Court stated that, as a matter of principle, the legislation did not

require a party against whom a BLO is sought to be made a party to or to participate in the main proceedings. But, where a BLO is contemplated, it would be sensible and efficient for the company against whom the BLO is being sought to be made a party to the main proceedings and for that application to be heard together with the main claim. Any difficulties with ensuring that the additional defendants to the BLO Claim were afforded a proper and cost-effective chance to deal with it could normally be dealt with by sensible trial management (although the judgment doesn’t say what that might entail).

- The judge would not need to determine the application for a BLO as part of the main proceedings; a further hearing could be directed to deal with that application.
- The legalisation assumes that the associated company will not be able to challenge a finding establishing liability of the original entity. But, by having the associated company as a party to proceedings avoids it subsequently arguing that the circumstances in which the liability of the original company was established mean that it is not “just and equitable” to make a BLO.

The *Prater* decision addressed the logistics of when an application for a BLO could be made – that is all that was asked of the Court at the time. The judgment does not deal with the question of what is “just and equitable”.

### The “just and equitable” test

The only case to date that has considered the “just and equitable” test under the BSA is *Triathlon Homes*. Although it deals with the test in the context of an application for a remediation contribution order (“RCO”), under s.124 of the BSA, it does cast some light on how the materially identical test in respect of BLOs might be applied.

*Triathlon Homes* concerned five residential buildings in Stratford, East London. The applicant sought reimbursement of costs incurred remediating the five blocks of flats. It was heard by the First Tier Tribunal (“FTT”).

In deciding what was “just and equitable”, the FTT identified that it was necessary to “distinguish the relevant from the irrelevant” and that whether it is just and equitable to make an RCO must be considered having regard to the purpose

1. See section 130 of the Building Safety Act 2022.
2. i.e. setting aside the company’s limited liability to hold its shareholders or directors personally liable for the company’s actions or debts.
3. [2024] EWHC 1190 (TCC)
4. [2024] UKFTT 26 (PC)
5. We understand the case is listed for trial in the first quarter of 2025, in what will be one of the most eagerly anticipated judgments of 2025.
6. The expectation was that BLOs were introduced to assist claimants (especially leaseholders) pursuing claims against developers. However, Aecom was the building services engineer, whilst Prater was the specialist D&B envelope subcontractor. They were co-defendants.
7. See in particular paragraphs 236-291.

of the relevant sections of the BSA. It then identified certain factors which it took into account as well as others that it disregarded or gave little weight to.<sup>7</sup>

**Relevant factors in deciding whether to award an RCO**

- RCOs are a new and independent remedy which is, essentially, non-fault based.
- The policy of the BSA is that primary responsibility for the cost of remediation should fall on the original developer, and that others who have a liability to contribute may pass on the costs they incur to the developer.
- In circumstances where the developer would be unable to comply with an RCO in any significant sum without the financial support of a parent company, it would be just and equitable to make an order against the parent too.

**Factors to be disregarded (or to which little weight was given) in deciding whether to award an RCO**

- The applicant's motivation in bringing an application, their identity or the basis of their eligibility to make the application were not relevant considerations.
- The availability to the applicant of other claims, or potential claims, should not disqualify it from making a claim for an RCO.
- No weight should be given to the changing identity of the ultimate beneficial owners. That the current owners of the freehold interest had no role in its initial development, and acquired their interest only following completion, was irrelevant because they each "*willingly assumed the risks associated with their investment*".
- It would be an unusual case in which the source or extent of a respondent's assets or liabilities would carry much weight.
- The ability (or not) of a party to pass on liability to some other party who may be responsible (e.g. its supply chain) is not a matter to which much weight should be given.

**Where do these cases leave us?**

*Prater* has clarified certain procedural questions regarding BLOs. They are not

a remedy available only to claimants – a defendant can also make an application for a BLO against a co-defendant. Furthermore, a party wishing to apply for a BLO need not wait until the conclusion of the "*main claim*". However, it did not deal with the substantive issue of whether it was "*just and equitable*" to award a BLO in that case. We will need to wait until 2025 before that issue is heard (on the assumption that this matter doesn't settle before trial).

The only guidance we have on that issue at present comes from *Triathlon Homes* – a case dealing with RCOs, rather than BLOs – and a judgment (from the FTT) that is not binding. Nevertheless, the guidance will give encouragement to those considering an application for a BLO – particularly for a party considering an application against the parent (or other group company) associated with the original developer, because of the emphasis the FTT placed on attaching liability to the original developer and any parent of that developer.

In terms of guidance as to the application of BLOs against main contractors, or members of their supply chain, the application of the guidance from *Triathlon Homes* is less clear and we await the first judgment from the Court. ■

## What lies beneath revisited: ground risk and site conditions in the JCT Design and Build Contract, 2024 Edition

The risk of unforeseen ground or site conditions remains an ever-present risk in most construction projects and the contractual clauses allocating such risk are usually some of the most negotiated provisions in any construction contract.

**Mark Pantry** asks whether the publication of the JCT Design and Build Contract, 2024 edition changed the perceived standard position in favour of the contractor.

In our 2021/22 *Annual Review*, I wrote an article about ground risk and the ways in which the main standard form contracts used in the United Kingdom, the JCT and NEC4 suite of contracts, approach and allocate such risk.<sup>1</sup>

To briefly summarise my previous article: where a fixed price construction contract is silent on ground risk or site conditions, then the standard position is that such risk sits as the contractor's responsibility in terms of price and programme. This is based on the common law principle that in promising to undertake works for a fixed price, the contractor is promising to complete those works even where the works are more difficult or more expensive for the contractor to complete.

The article went on to consider the then current edition of the JCT Design and Build Contract, 2016 edition ("JCT DB 2016"). JCT DB 2016 is silent on most types of ground risk other than the discovery of antiquities on site. Where antiquities or "other objects of interest or value" are found on the site, then the standard form JCT DB 2016 allows the contractor to claim an extension of time

and an addition to the contract sum to the extent that such discovery delays the works.

There are no other provisions in the JCT DB 2016 which would ordinarily entitle the contractor to an extension of time or an addition to the contract sum, and so it must follow that the contractor takes the risk in terms of price and programme where it makes a discovery of anything in the ground which is not an antiquity or object of interest or value.

### JCT Design and Build Contract, 2024 edition

The JCT Design and Build Contract, 2024 edition ("JCT DB 2024"), which was released earlier this year as part of the wider 2024 update of the JCT suite of contracts, appears to change the JCT's standard approach to ground risk and existing site conditions. New clauses 3.15.3 and 3.15.4 of the JCT DB 2024 extend the pre-existing procedure for antiquities in JCT DB 2016 to the discovery of "any asbestos, contaminated material or unexploded ordnance" on the site.

There are further amendments to clause 2.26.4 and clause 4.21.3 of the JCT DB 2024 which allows the contractor to make an application for an extension of time or addition to the contract sum on the discovery of any asbestos, contaminated material or unexploded ordnance or on receipt of the employer's instructions in relation to the same. The contractor is not entitled to an extension of time or addition to the contract sum to the extent that the "presence of asbestos or contaminated material has been identified in the Contract Documents and/or any such material has been brought on to the site by the Contractor or any Contractor's Person". This clarification is presumably included to prevent the contractor trying to claim relief for contamination which it, or a subcontractor, has brought on to site.

The drafting does raise some queries about the application of such clauses to asbestos or contaminated material identified in the Contract Documents. For example, if the Contract Documents identify a certain quantity of asbestos in a certain part of the site, but the contractor discovers a greater quantity of asbestos in a different part of the site, is the contractor only entitled to an extension of time and additional costs for the quantity of asbestos discovered in excess of that which was identified in the Contract Documents? It is also noted

that these clarifications do not apply to unexploded ordnance and so, as drafted, a contractor should be entitled to additional time and money where it discovers unexploded ordnance which was identified in the Contract Documents.

### A move towards NEC4?

The above amendments to the JCT DB 2024 edition perhaps suggest a move by the JCT towards an approach which is more familiar to NEC users. The NEC4 Engineering and Construction Contract includes as a compensation event (entitling the contractor to additional time and money) the encountering of "physical conditions" within the site which an experienced contractor would have judged to have such a small chance of occurring, having regard to all the information available to it, that it would have been unreasonable to allow for such conditions.

The difference between the JCT and NEC approaches remains the test of foreseeability, which is present in the NEC4 but not the JCT DB 2024. The discovery of asbestos, for example, in a cut and carve project to a building of a particular age would be completely foreseeable to a contractor, but that contractor would be entitled to additional time and money under the JCT DB 2024 except where such asbestos is included in the Contract Documents.

The new provisions on ground risk and site conditions do then move the "standard" position more in favour of the contractor, but this is only in relation to the standard form JCT DB 2024, and these provisions are frequently amended.

As I concluded in my 2021 article, the parties to a construction contract must always give due regard to the impact of ground risk and the encountering of adverse site conditions to reach agreement on how this risk should be allocated between the parties. ■

1. <https://www.fenwickelliott.com/research-insight/annual-review/2021/ground-risk-site-conditions>

## Henry Construction Projects Ltd v ProMEP Ltd<sup>1</sup>: TCC decides an adjudicator's decision was not procured by fraud

In this unusual adjudication enforcement case, Henry sought to defend the enforcement of an adjudicator's decision on the basis that it had been procured fraudulently by ProMEP. Henry's allegation, which was dismissed by the judge, was that, in its submissions in the adjudication, ProMEP had deliberately only provided the good parts of counsel's advice to the adjudicator and had omitted the parts that were unhelpful to its case.

The TCC also considered the effect of a company voluntary arrangement ("CVA") on ProMEP's claim and whether automatic insolvency set off applied such that ProMEP's claim was settled by the CVA. **George Boddy** explains more.

### Background

ProMEP is an M&E contractor engaged by Henry to carry out works across a number of different projects over a four-year period. Under one of those contracts, ProMEP was engaged to design, supply and install M&E works at a project at Stanbridge Earls ("the Stanbridge Contract").

In early 2021, the relationship between the parties deteriorated. Both claimed that they were entitled to terminate various contracts, including the Stanbridge Contract. As is common in a termination scenario, each party claimed that the other had repudiated the contract. In July 2021, ProMEP claimed that Henry was in repudiatory breach and had accepted that repudiation as terminating the contract.

Henry disputed that it was in repudiatory breach and that ProMEP had a right to terminate. Henry therefore claimed that ProMEP's termination was wrongful and thus repudiatory itself.

Later, in October 2021, the directors of ProMEP proposed that it enter into a CVA. On 28 March 2022, Henry submitted a proof of debt form for three debts arising out of contracts with ProMEP, but not the Stanbridge Contract. By 27 July 2022, the CVA was successfully completed.

### The adjudication

In November 2022, ProMEP commenced an adjudication against Henry seeking a declaration that Henry was in repudiatory breach of contract and claimed payment for work done and damages of £887,545.80. Henry rejected this claim and advanced its own counterclaim for £825,208 on the basis that ProMEP was in repudiatory breach.

One of Henry's arguments in the adjudication was that ProMEP's claim had been settled by the CVA. Henry argued that the CVA was intended to function in the same way as insolvency where set off was mandatory so that a creditor ends up with a final position and cannot be pursued for further monies. As part of its rejoinder, Henry included advice from counsel that supported its position as regards the effect of the CVA.

ProMEP disagreed that its claims were settled by the CVA and contended that they were excluded from it. ProMEP did not follow suit in its surrejoinder, but instead summarised some advice that it had previously received from counsel on the effect of the CVA.

1. [2024] EWHC 1825 (TCC).
2. [2020] EWHC 223 (TCC).
3. [2024] EWHC 1825 (TCC), at [43].
4. [2024] EWHC 1825 (TCC), at [44].
5. *Ibid.*
6. *SG South Ltd v King's Head Cirencester LLP* [2009] EWHC 2645 (TCC).
7. Insolvency Rules Part 2, Rule 2.3(1).
8. [2024] EWHC 1825 (TCC) at [90].

On 5 January 2023, the adjudicator found that Henry had repudiated the Stanbridge Contract and awarded ProMEP the sum of £90,380.49. The adjudicator also found that ProMEP's claims were not settled by the CVA.

Henry subsequently issued Part 8 proceedings seeking a declaration that the CVA had settled ProMEP's claim and ProMEP issued Part 7 proceedings seeking to enforce the adjudicator's decision.

### **Was the adjudicator's decision procured by fraud?**

In defence of the enforcement proceedings, Henry sought to argue that the adjudicator's decision had been procured fraudulently by ProMEP and that it should not be enforced. Since the decision, Henry obtained a full copy of the advice ProMEP had received from counsel that it had summarised in its surrejoinder.

Henry contended that ProMEP had deliberately provided a partial extract of the advice and had presented it as counsel's unequivocal opinion when no such opinion had been given. In other words, according to Henry, ProMEP had only included the good parts of counsel's advice and had left out the bad parts; the summary was selective and, therefore, misleading. Henry argued that this met the threshold in *PBS Energo v Bester Generacion*<sup>2</sup> that "the evidence on which the adjudicator has relied is shown to be both material and arguably fraudulent".

However, the judge disagreed and held that ProMEP had not fraudulently misrepresented counsel's advice. ProMEP had made clear in the surrejoinder that the summary was only its understanding of the advice and had not been approved by counsel. While ProMEP's summary had omitted the sections setting out the argument that ProMEP's claims were settled by the CVA, counsel had not expressed an opinion that preferred that view and ProMEP's summary was clear that counsel had contemplated the competing arguments in the advice. The judge held that it went too far to infer from these omissions that ProMEP's summary was fraudulent.

Even if ProMEP's summary had been fraudulent, it was not material because the advice was not "evidence" relied on by the

adjudicator and was simply legal argument. The advice was held to be "more akin to a representation as to the law, and a flawed statement of the law made by a party in an adjudication would not be a reason that the decision was unenforceable since the decision on the applicable law would be a matter within the jurisdiction of the adjudicator".<sup>3</sup>

The judge noted that it was common practice to include in adjudication submissions an open advice from counsel, which was "a mechanism or technique to put arguments before the adjudicator as if they were submissions from counsel with the intention and hope that the arguments will carry some weight with the adjudicator as the views of counsel".<sup>4</sup> It is then a matter for the adjudicator to form his own view when faced with two conflicting opinions from counsel, particularly when the adjudicator is an experienced lawyer (as was the case here).

The "nature of the reliance" of an adjudicator or tribunal on legal submissions, which provide an exposition of the competing legal arguments, was quite different from the "nature of the reliance" on statement of existing fact.<sup>5</sup> The failure to disclose the full advice could not, therefore, give rise to an arguable defence that the decision was procured by fraud when it was only legal argument and not statements of fact.

Further, the judge also found that Henry could have raised its concerns about ProMEP's summary of its counsel's advice during the adjudication but had not done so. Henry's defence, therefore, also fell foul of the established principle that if the allegation of fraud could have been made in the adjudication itself, but was not, then it could not be raised as a defence to enforcement.<sup>6</sup>

### **Was ProMEP's claim settled by the CVA?**

This question was the subject of the counsel's advice that the parties deployed in the adjudication. It was to be answered by applying the usual rules of contractual construction to the terms of the CVA.

ProMEP's position was that its claim against Henry was excluded by the terms of the CVA, the purpose of

which was to deal with its debts but allow it to continue trading and pursue claims in the future. ProMEP relied on clause 8.3 of the CVA which expressly provided that all assets, other than those identified in the clause, were excluded from the CVA. It argued that its claim against Henry was an asset that was excluded.

Henry maintained that the CVA was intended to operate as a full and final settlement of all amounts due to the creditors of the company and that the setoff process under rule 14.25 of the Insolvency Rules automatically applied. In other words, Henry argued that the effect of the CVA was that any debts owed to ProMEP from Henry were set off against Henry's claims against ProMEP and were accordingly compromised. Henry had submitted a proof of debt in the CVA for almost £3.5 million, but received less than 10% of that sum in dividends.

The judge found that, on a proper construction of clause 8.3 of the CVA, ProMEP's claim was excluded from the CVA and it was free to pursue it against Henry. The declarations sought by Henry were therefore rejected and there was no reason not to enforce the adjudicator's decision.

Despite this finding, the judge expressed some sympathy for Henry's argument, primarily because ProMEP's claim against Henry had not been disclosed in the CVA Proposal and Statement of Affairs. This was a requirement of the Insolvency Rules which obliged ProMEP to set out its assets, which assets are to be excluded from the CVA and "any other matters the proposer considers appropriate to enable members and creditors to reach an informed decision on the proposal".<sup>7</sup> The judge described the omission of ProMEP's claim against Henry as a "significant failure of disclosure".<sup>8</sup>

### Commentary

The judge's remarks on the status of counsel's advice deployed in the course of an adjudication will be of interest to practitioners and adjudicators. The disclosure of counsel's advice in adjudication is a tactic sometimes used to persuade adjudicators of the merits of a party's position as the views of counsel. Both parties adopted it here, although, whereas Henry provided the full advice, ProMEP only provided a summary.

While Henry argued that ProMEP's summary was so partial that it had procured the adjudicator's decision fraudulently, the judge decided that it

was sufficiently clear that the summary was ProMEP's understanding of the advice.

In any event, counsel's advice is not evidence of fact, which, if knowingly misrepresented, could amount to fraud, but rather legal argument designed to persuade the adjudicator of a party's position.

Ultimately, it is for an adjudicator to consider the parties' competing arguments and reach a decision on the law. If one party makes a flawed or incomplete statement of law in the course of its submission, including the provision of a partial summary of counsel's advice, then that is clearly not a reason not to enforce a decision. In the end, the judge doubted whether there could ever be circumstances in which a legal opinion was so badly misrepresented that it would amount to fraud. ■



*Ultimately, it is for an adjudicator to consider the parties' competing arguments and reach a decision on the law.*

## Defining the boundaries: recent rulings clarify the applicability of the HGCRA

Ever since the Housing Grants, Construction and Regeneration Act (the "Act") came into force in 1998, the Courts have needed to consider what contracts, concerning what works, are covered by its provisions. In the early days, there were regular updates provided in the case law about, primarily, what were 'construction operations' as well as the ambit of the various exclusions. This gradually came to a halt as the courts clarified the position. As **Katherine Butler** and **Ava Solouk** explain, it was therefore somewhat of a novelty that two cases in close succession at the end of 2023 required the Courts to once again establish the boundaries of the Act.

In *Crystal Electronics Ltd v Digital Mobile Spectrum Ltd*,<sup>1</sup> HH Judge Keyser KC revisited what are considered 'construction contracts' and 'construction operations', whereas HH Judge Stephen Davies was called on to decide where England, as a matter of fact, ends in *Van Elle Ltd v Keynvor Morlift Ltd*.<sup>2</sup>

Both of these cases relate to the enforcement of an adjudicator's decision.

In the event that the Act did not apply, the adjudicator would have lacked jurisdiction and their award would be a nullity.

### Relevant requirements of the Act

Under s.104(2), construction contracts include agreements:

- "(a) to do architectural, design, or surveying work, or*
- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape in relation to construction operations".*

Under s.104(6)(b), the provisions of the Act apply to construction contracts that "relate to the carrying out of construction operations in England, Wales or Scotland".

'Construction operations' are defined in s.105(1) and, insofar as they are relevant to the cases considered here, include:

- "(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);*
- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;*
- (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;*

...

- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works".*

### Established parameters of the Act

The table below offers (very much non-exhaustive) examples of previous case law that has interpreted and contextualised the requirements of the Act:

Case	Decision
<i>Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture</i> [2010] EWHC 1076 (TCC)	Preparing fabrication drawings, off-site fabrication and deliveries to site are 'construction operations'.
<i>Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd</i> [2001] BLR 407	The installation of shop fittings, which are only bolted to the floor in order to ensure their stability, is not 'construction operations' because the fittings do not "form part of the land".
<i>Savoie and Savoie Ltd v Spicers Ltd</i> [2014] EWHC 4195 (TCC)	Works to install a conveyor belt system that was secured to the floor are 'construction operations' because the system could not be easily removed and, therefore, did "form part of the land".
<i>Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP</i> [2024] UKSC 23	A collateral warranty is not a construction contract as it warrants the performance under the primary contract but is not, in of itself, an agreement 'to do' construction works.

### ***Crystal Electronics Ltd ("CEL") v Digital Mobile Spectrum Ltd ("DMSL")***

CEL brought an action to enforce two smash and grab adjudication decisions. This was challenged by DMSL on the grounds that the contract between them was not a construction contract because the works involved did not constitute 'construction operations' for the purposes of s.105 of the Act.

DMSL is a joint venture between four UK mobile network operators, working together to carry out "remedial intervention services" concerning the detrimental effect of 4G mobile broadband services on digital terrestrial television reception. DMSL engaged CEL to assist customers through fitting filters or signal amplifiers to television sets and, in some cases, replacing aerials on roofs (the "CEL Works").

CEL submitted that s.105(1)(b), read with the relevant provisions of the Communications Act 2003, clearly stated that works concerning the apparatus for use in connection with a digital television network were construction operations. HHJ Keyser KC agreed with this submission; however, s.105(1)(b) also requires the apparatus to form part of the land. HHJ Keyser KC quickly established that television sets were patently not items of apparatus forming part of the land. The judge then turned to whether the aerials

that CEL replaced did form part of the land. The judge held that aerials were "pieces of replaceable equipment, easily installed and removed, which were usually attached to the buildings by means of a secure form of strapping and were in no sense integrated into the buildings".<sup>3</sup> Therefore, they too were not apparatus that formed part of the land, and thus, the CEL Works did not constitute construction operations.

**“ The judge held that the CEL Works did not amount to surveying, nor did they relate to construction operations. ”**

CEL also argued that if the CEL Works were not within the scope of s.105, they fell within the scope of s.104(2), regarding the carrying out of surveying work and/or providing engineering advice in relation to the television aerials in question. This argument was similarly dismissed on the basis that, for works to fall within the scope of s.104(2), they must be activities in relation to 'construction operations', and the surveying work relied upon must be "land and building surveying, such as is done by surveyors in the construction industry".<sup>4</sup> The surveys conducted by CEL were merely observational tasks which

consisted of looking at the aerials on the outside of the customer's property and, once inside, their television equipment. The judge held that the CEL Works did not amount to surveying, nor did they relate to construction operations.

Accordingly, the contract between the parties was not covered by the Act, and the adjudicator therefore had no jurisdiction to determine the dispute. The decision could not, therefore, be enforced.

### **Van Elle Ltd ("VEL") v Keynvor Morlift Ltd ("KML")**

VEL sought to enforce an adjudicator's decision which awarded it the sum of £335,142.33 from KML, being the true valuation of its entitlement under the contract made between them. VEL was engaged to replace existing pontoon berthing and mooring piles at Fowey Harbour in Cornwall (the "VEL Works"). The Fowey Harbour is located inland of the point where the River Fowey meets the sea. The pontoons are connected by a hinged ramp, with one being connected to the riverside sea wall by a gangway. The mooring piles are driven into the ground, under the river, below low water level and are not connected to the pontoons.

KML opposed the application and argued that the adjudicator did not have jurisdiction. It contended that s.104(6) limits the construction operations defined in s.105 (above) to operations carried out in 'England, Wales and Scotland'. Given that the Act does not define 'England', KML relied on the definition in other legislation,<sup>5</sup> which cross referred to the Ordnance Survey election map (the "OS Map"). The OS Map shows the Fowey boundary as running along the coastline and the riverbank. KML argued that, given that the pontoons and mooring piles are located within River Fowey (i.e. outside the riverbank border), they are not within England.

VEL submitted that the OS Map was based on the Territorial Waters Order in Council 1964, which had been revoked by the Territorial Sea (Baselines) Order 2014 (the "2014 Order"). As an alternative definition, VEL relied on Article 8 of the United Nations Convention on the Law of the Sea ("UNCLOS") which provides that "... waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State". The 'baseline of the territorial sea' effectively draws a straight line

across the river's mouth. On this basis, VEL argued the pontoons and mooring piles sat within the internal waters, and therefore the land, of England.

S.104(6)(b) of the Act restricts its application to contracts relating to construction operations that are wholly within England, Wales and Scotland. However, the Act is intended to have broad effect. HHJ Davies, therefore, held that, relying only on the OS Map to define the boundaries of England, it would mean that "*anything more than a minimal encroachment of a building, structure or works beyond the low water mark would have the effect of meaning that the whole contract would fall outside the Construction Act*".<sup>6</sup>

The judge held that UNCLOS was mutually consistent with the 2014 Order and that, by virtue of the Interpretation Act 1978, reference to 'land' in s.105(1) of the Act includes land covered by water. Accordingly, HHJ Davies decided that the VEL Works to the pontoons and mooring piles, being landward of the mouth of the River Fowey, were construction operations within England. The Act, therefore, applied and an order for the enforcement of the adjudicator's decision was granted.

### **Conclusion**

The above cases add to the existing jurisprudence establishing what is and what is not covered by the Act.

Accordingly, we now know that:

- Television aerials do not "*form part of the land*" and visual observations of the same do not constitute 'surveying works', nor do such observations amount to 'construction operations'; and
- Construction operations carried out on land, whether or not covered by water, within the inland waterways of England, Scotland or Wales are within the geographic ambit of the Act. ■

1. [2023] EWHC 2656 (TCC)

2. [2023] EWHC 3137 (TCC)

3. [2023] EWHC 2656 (TCC), at paragraph 46.

4. *Ibid*, at paragraph 48(2)

5. The Interpretation Act 1978, which refers to the Local Government Act 1972

6. [2023] EWHC 3137 (TCC), at paragraph 64.

## Serial adjudications: when has a dispute already been determined?

In 2023, the Court of Appeal provided a useful summary of the relevant principles from case law which apply when considering potential overlap between serial adjudications (*Sudlows Ltd v Global Switch Estates 1 Ltd* [2023] EWCA Civ 813).

While, in the words of Lord Justice Coulson, the basic rules are “*crystal clear*”,<sup>1</sup> the issue of whether a dispute has already been decided in an earlier adjudication continues to arise quite frequently. In the last year, this issue has been considered in two decisions of the Technology and Construction Court.

**Sonia Ginders** outlines the basic principles to consider when determining the effect an earlier decision may have on a later adjudication, before reviewing these recent decisions.

### Determining what has already been decided: the basic principles

Section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 requires that a construction contract must provide, in writing, that the decision of an adjudicator is binding until the dispute is finally determined, by legal proceedings, agreement, or by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration).

This means a party to a construction contract is debarred from referring successive applications to adjudication where they concern a dispute that has already been determined in adjudication.

The consequences of referring such a dispute can include a subsequent adjudicator declining to decide on specific matters that are referred to it, or resigning where it is the only matter they are asked to decide,<sup>2</sup> or, where they incorrectly proceed to give a decision on the matter, the decision not being enforceable.

As to what constitutes a “*decision of an adjudicator*”: this is a question of fact and degree.<sup>3</sup> Parties are bound by the essential components of, or basis for, an earlier decision,<sup>4</sup> and the search for those components should not be too granular.<sup>5</sup>

In the Court of Appeal’s decision in *Sudlows*, Coulson LJ recited the three over-arching principles to be applied by an adjudicator, or an enforcing court, when considering arguments about overlap between adjudications:

1. The issue of whether a particular dispute has already been decided should not be a complex question of interpretation of documents and citation of authority. The need for speed and the importance of at least temporary finality means the adjudicator (and, if necessary, the court on enforcement) should be encouraged to give a robust and common-sense answer to the issue.
2. Any assessment should look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision. While it can be relevant to consider the adjudication notice, referral notice, and so on, the form and content of the documentation is of lesser relevance compared to what was, in reality, decided and can sometimes be misleading.
3. Flexibility is critical to the test of fact and degree, which should prevent a party from re-adjudicating a claim (or a defence) on which they have

unequivocally lost, but also ensure that what is essentially a new claim or a new defence is not shut out.

### Recent Decisions

#### *Wordsworth Construction Management Ltd v Inivos Ltd t/a Health Spaces*<sup>6</sup>

This was a case which concerned the summary enforcement of two adjudication decisions, each made in either parties' favour. Both parties respectively said the decision in their favour should be enforced and the other decision should not.

#### The first adjudication

The first adjudicator's decision ordered Inivos Ltd t/a Health Spaces ("HS") to pay Wordsworth Construction Management Ltd ("WCM") the sum of £170,562.69 (the "First Decision").

WCM's claim sought damages arising from HS's repudiatory breach due to it terminating the contract. WCM also sought payment for the balance due under the contract.

In response, HS claimed that the contract was properly terminated, and sought to recover its claims for loss and/or damage caused by the termination, as well as contra charges for alleged breaches by WCM prior to the termination. The latter were referred to as "Item B" and "Item D" claims in HS's claim summary table, which included two columns: one for HS's valuation if the contract was terminated due to WCM's default, and another for HS's valuation if the contract was terminated for convenience. The Item B and Item D claims were not separated as freestanding claims in the summary table.

The first adjudicator decided that HS had repudiated the contract and, on that basis, decided that all of HS's claims, including the Item B and Item D claims for breaches prior to termination, failed.

#### The second adjudication

The second adjudicator's decision ordered WCM to pay HS the sum of £192,772 and £4,978.54 in interest (the "Second Decision").

In the second adjudication, HS claimed substantial counterclaims against WCM, which had been included as part of the Item B claims in the first adjudication.

The second adjudicator awarded sums to HS, and found he was not bound by the First Decision because, in that decision, the contra charges were rejected as they were not part of the determination of the

account, rather than being addressed as freestanding breaches of contract.

#### The Court's analysis

The first issue the Court was asked to decide was whether the First Decision was unenforceable against HS due to a breach of natural justice. HS argued in its defence that the first adjudicator had consciously failed to decide its counterclaims (including the Item B claims), or give reasons for his decision on those counterclaims, and dismissed them instead on a ground neither party had argued.

The Court agreed that the First Decision on the counterclaims was expressed "extremely briefly", and that the adjudicator had not engaged at all in considering the quantum of those items (simply recording a value of £0.00). The Court also found the first adjudicator had failed to consider the merits of the counterclaims, based on the incorrect assumption that, once the termination issue was decided in WCM's favour, it disposed of the counterclaims.

However, the Court held the first adjudicator's approach to the counterclaim had been an error of law, not a breach of natural justice, and the mistake was inadvertent. The Court did not consider the error was such that the adjudicator effectively refused to consider the issue at all, or that he stepped outside the case before him at all or in any material respect.

The Court also noted that HS's response in the first adjudication may have created some "degree of equivocality" about whether the termination issue would dispose of its counterclaims, by claiming its counterclaim in brief terms and not separating out freestanding claims which would be unaffected by the decision on termination.<sup>7</sup>

In the case, the Court noted that parties must "live with decisions made on an erroneous basis unless and until challenging them later, if they choose to do so".<sup>8</sup>

As to whether the Item B claims in the second adjudication were already decided in the First Decision, the Court noted that although, on the face of it, a second adjudication awarding some of HS's counterclaim would seem to offend the basic principles outlined by Coulson LJ in *Sudlows*, it is important to consider what precisely was decided. On that basis, the Court held that the First Decision did not decide the merits or quantum of HS's Item B claims or Item D claims as individual

breaches of contract, because they were not decided or even considered by the first adjudicator on that basis at all.<sup>9</sup>

#### *Dawnvale Café Components Limited v Hylgar Properties Limited*<sup>10</sup>

In this case, the Court was asked to consider whether a proposed referral to adjudication was impermissible, because it claimed losses arising from a repudiatory breach of contract that had already been determined in an earlier adjudication.

#### The first adjudication

In the first adjudication, the property developer Hylgar Properties Limited ("Hylgar") had referred its claim for the true value of works carried out by the contractor Dawnvale Café Components Limited ("Dawnvale") and sought a repayment from Dawnvale of £180,322.92. Dawnvale denied any amount was due and advanced its own counterclaim for £147,298.25, which relied on the absence of a payless notice.

The contract had been terminated in or around November 2020, which was not in dispute between the parties. However, both parties alleged that the other had committed the relevant repudiation.

In his decision, the first adjudicator decided that Dawnvale had repudiated the contract. In regard to the parties' financial claims, the adjudicator determined the true value of the works at termination, finding that Dawnvale had been overpaid and that its counterclaim had no effect on Hylgar's claim.

Following an enforcement action commenced by Hylgar, a settlement was reached between the parties. Dawnvale paid the awarded sum in tranches between August 2021 and February 2022.

#### The second adjudication

Two years later, by letter of claim dated 31 August 2023, Hylgar sought further losses arising from the same repudiatory breach and intimated an intention to refer a claim for these losses to adjudication. Hylgar's claim included additional build costs, remedial works and delays arising from and following the repudiation, lost rent, and lost profit.

Dawnvale then commenced Part 8 proceedings to prevent Hylgar from referring the new claim to adjudication. One of the grounds advanced by Dawnvale was that Hylgar was seeking referral to adjudication on a dispute that had already been determined. In response, Hylgar claimed that it was not

seeking to determine again the question of whether Dawnvale repudiated the contract; rather, it was seeking to determine its entitlement to additional heads of loss and their quantum.

#### The Court's analysis

In its judgment on the issue, the Court held that there was no overlap between the decision of the first adjudication and the matters intended for referral to a second adjudication.

Although Dawnvale argued that cause of action was the same in both cases, and the Court agreed that may in many cases be "a strong pointer as to whether the disputes are substantially the same",<sup>11</sup> in this case, it was not determinative of any overlap.

The question decided in the first adjudication was whether Dawnvale was in repudiatory breach and the true value of work undertaken before that time. The second adjudication was intended to determine the recoverability and value of certain heads of loss consequential upon the repudiation. The Court held that there was no overlap between these matters. In reaching its conclusion, the Court noted the purpose of adjudication, which is to avoid undue technicality; facilitate cashflow; and pay now, argue later.<sup>12</sup>

*"If the position were otherwise, a referring party would be required to bring its entire claim encompassing all its heads of loss to adjudication at the same time. But (as with the consequential losses in this case) some heads of loss (for example delay) may not become apparent for some time. Such an approach would lead to delay in referring matters to adjudication and could obstruct rather than promote cashflow. That would not be consistent with the overriding approach to adjudication ..."*

#### **Conclusion**

Both decisions of the Technology and Construction Court in *Wordsworth* and *Dawnvale* highlight a key difference between adjudication and litigation when it comes to guarding against repetitive proceedings on the same matters, which is the focus on the substance of what is decided by the adjudicator.

While the authorities have, on occasion, when considering potential overlap in adjudication, drawn analogies with the

rule in *Henderson v Henderson*,<sup>13</sup> or res judicata estoppel,<sup>14</sup> the principles which apply to adjudication are not the same as litigation. As explained by Mr Justice Stuart-Smith in *Hitachi Zosen Inova AG v John Sisk & Son Limited*,<sup>15</sup> this is not least because adjudication is, by its very nature, an interim procedure for protecting and promoting cashflow in the construction industry, whereas litigation is designed to ensure finality from the outset.

In the cases of *Wordsworth* and *Dawnvale*, which both contained factual scenarios that could – on the face of it – seem to offend some of the principles of res judicata in litigation, the focus on the substance of what was ultimately **decided**, meant, in both cases, that the later adjudications were permissible. ■

1. [2023] EWCA Civ 813, per Coulson LJ at [55].
2. In *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC) at [38] – [39].
3. *Quietfield Limited v Vascroft Construction Limited* [2007] BLR 67, at [47] per Dyson LJ. See also paragraph 9(2) of the Scheme for Construction Contracts (England and Wales) Regulations 1998.
4. See *Hyder Consulting (UK) Limited v Carillion Construction Limited* [2011] EWHC 1810 (TCC); [2011] 138 Con LR 212 at [38].
5. Per O'Farrell J in *Global Switch Estates 1 Ltd v Sudlows Ltd* [2020] EWHC 3314 (TCC) at [66] – [74].
6. [2024] EWHC 617 (TCC)
7. At [52].
8. At [47].
9. At [58].
10. [2024] EWHC 1199 (TCC)
11. At [38], citing the court in *Carillion Construction Ltd v Smith* [2011] EWHC 2910.
12. At [36].
13. (1843) 3 Hare 100.
14. See for example, the judgment of Mr Justice Coulson (as he was then) in *Benfield Construction Limited v Trudson (Hatton) Limited* [2008] EWHC 2333 (TCC) at [29]–[31], and [51]–[55].
15. [2019] EWHC 495 (TCC). As endorsed by Coulson LJ in *Sudlows* at [51] – [52]

## Extending time for serving an adjudication referral after the notice of adjudication

Part II of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) as amended by the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA Act 2009) (together the "Act") gave parties to a construction contract the right to adjudicate any dispute under that contract. This is well known, but what about the timing of service of your referral, which is the key document setting out the detail of your claim? **Philip Barnes** takes a closer look at whether the timing of service can be delayed.

The relevant Section 108 states:

**"108 Right to refer disputes to adjudication**

- (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
- (2) The contract shall include provision in writing so as to –
- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
- (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of such notice."

If the parties have not made adequate provision for adjudication in their contract, then the procedure specified in the Scheme<sup>1</sup> applies. The Scheme requires:

*"7. (1) Where an adjudicator has been selected ... the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the 'referral notice') to the adjudicator."*

That paragraph of the Scheme is mandatory. It requires the referral to be served within seven days of the notice.

The usual procedure is, therefore, that a party gives notice of its intention to refer a dispute to adjudication, and then it provides its referral to the responding party and the adjudicator within seven days of the notice. Timescales have been strictly enforced and if the adjudicator and the other party do not receive the referral within seven days, then the referring party has to start the whole process again. Normally, this would be little more than an inconvenience and does no more than cause delay to the whole process. The referring party just starts again and (likely) the same adjudicator is appointed.

Occasionally, the timing of the notice is important for other contractual reasons, and the question has arisen as to whether the parties can agree to extend the seven-day deadline to serve the referral.

This question arose in the two recent cases, *Bellway Homes Ltd v Surgo Construction Ltd*<sup>2</sup> and *Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd*.<sup>3</sup>

1. The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011
2. [2024] EWHC 269 (TCC)
3. [2024] EWHC 591 (TCC)

**Bellway**

In *Bellway Homes*, an amendment in the contract stipulated service of the referral “as soon as reasonably possible” instead of “not later than seven days” after the notice, but the question arose as to whether this was permitted, particularly given the mandatory nature of the Scheme wording.

The Court held that the wording of s.108 of the Act requiring the referral to be served “with the object” of it being within seven days of the notice did not preclude a slightly longer period as the parties had agreed that by contract. Although paragraph 7(1) of the unamended Scheme required service of the referral within seven days of the notice, parties can contract out of the Scheme as long as they comply with the Act. Therefore, “as soon as possible” was compliant with the Act and so an enforceable contractual amendment to the Scheme.

In *Bellway Homes*, there had been an amendment to the contract permitting service of the referral more than seven days after the notice, but can parties agree, on a purely “ad hoc” basis, to extend time for service of the referral even after the notice has been served? In effect, can the responding party agree to “waive” its right to have the referral served within seven days of the notice?

**QFS**

This “ad hoc agreement to extend time” or “waiver” occurred in *Battersea v QFS*. In that case, there was no amendment to the contract as had been the case in *Bellway Homes*. The contract was mandatory in that it followed the Scheme by stating that the referral “shall” be referred to the adjudicator within seven days of service of the notice. The parties agree to extend time for service of the referral after the service of the notice and before the seven days expired.

The nominated adjudicator stated that he preferred confirmation that no point would be taken about late service of the referral or alternatively re-service of the notice. However, re-serving the notice was not viable for other reasons of which the adjudicator was unaware.

The court held that both parties had agreed (at least at the outset) to defer service of the referral, rather than there being a waiver by the responding party, as there was consideration from both parties. However, as the effect of waiver or agreement was the same, there

was no need to decide this point. The agreement to extend time for service of the referral was binding.

**Conclusion**

It now seems clear that parties can, by contract, allow themselves more time between service of the notice and service of the referral (following *Bellway*) and, following *QFS*, can also mutually agree to extend time for service of the referral after the notice has been served (or the receiving party can unilaterally waive its entitlement to receive the referral within seven days of the notice).

That said, the safer course of action is to ensure the correct procedure is followed, the notice served, the adjudicator then appointed and the referral served within seven days of the notice unless there are pressing legal reasons not to do so. ■

## Related disputes in PFI and PPP projects: looking both ways at the same time?

In almost every PFI and PPP project, the principal contracts – the project agreement, the D&B contract and the services contract – will include bespoke dispute resolution procedures. In addition to providing for sequential and escalating processes (typically good faith negotiations followed by adjudication followed by arbitration or litigation), these dispute resolution procedures will also provide mechanisms for the determination of what are usually characterised as “related disputes”. However, as **Ted Lowery** explains, these mechanisms are not always straightforward.

### Introduction

Where the primary obligations of the project company, to design and build the infrastructure asset and thereafter to deliver services to the asset for 25 years or so, are stepped down to the D&B contractor and the services contractor respectively, it follows that any failure of the asset, or in the delivery of the services, is likely to raise common issues across the project agreement and the D&B contract and/or the services contract. The objective of related disputes mechanisms is to ensure that cross-contractual issues can be considered in a common or related forum, thus eliminating the risk (particularly significant for the project company) of conflicting outcomes.

PFI contracts usually seek to achieve this objective by providing for adjudications under the project agreement and the D&B contract and/or the services contract to be linked – to varying degrees – if common issues are raised:

- Some contracts will provide for straightforward consolidation of related disputes so that the same issues under different contracts are considered in the same adjudication.
- Others provide for parallel but discrete adjudications with the same adjudicator appointed in each dispute and given powers to enable the procedures to be dovetailed.
- Other arrangements may provide only that the project company can insist upon the same adjudicator being appointed in both adjudications, in the expectation that this will be sufficient to achieve consistent outcomes.

Albeit varied in form, most related disputes mechanisms are cumbersome and place the onus firmly on the project company to drive the processes forward, for example, via the issue of timely notices. As such, these mechanisms often create a number of hurdles for any project company that seeks to protect itself against the spectre of conflicting outcomes on cross-contractual issues:

- Firstly, there is an inherent dichotomy within related disputes insofar as the project company will usually find itself having to defend claims against a public body but pursue the same claims against its D&B contractor and/or services

contractor. Therefore, related disputes adjudications can be vulnerable to challenge:

- o The D&B contractor and/or services contractor may assert that there is nothing to resolve on grounds that they and the project company both deny the public body’s claims. Hence jurisdictional objections on a “no disputes” basis can be raised.
- o Claims against the D&B contractor and/or services contractor may be undermined by the not unreasonable defence that the project company is approbating and reprobating.
- Secondly, related disputes often involve issues of contested liability between the D&B contractor and the services contractor, for example, where it is not clear if the asset failure has been caused by design or workmanship errors or because of post-completion deficient maintenance. In this event, the project company will have to try to bring both the D&B contractor and the services contractor into the related disputes process with the public body, creating a higher level of complication.
- Thirdly, related disputes mechanisms can be imprecisely worded. This can cause problems because the mechanisms in the project agreement and in the D&B contract and/or services contract must be sufficiently reciprocal in order to be enforceable.

It follows that any project company contemplating related disputes adjudication will need to get its ducks in a row in advance and ensure that in its preliminary exchanges with the public body, the D&B contractor and the services contractor, it sets out the related disputes it wishes to pursue and avoids any open statements – for example, unqualified admissions or denials of liability – that might prejudice its position against any of the other parties. To this extent, the project company’s correspondence and submissions will frequently resemble Janus undertaking an exercise in doublethink: simultaneously pursuing and defending the same claims whilst looking towards and away from the public body and the D&B contractor and the services contractor.

1. [2024] EWHC 37 (TCC).

There are alternatives to these minefields for the project company but they ordinarily lie in the gift of the D&B contractor and/or the services contractor:

- The contracts may provide for name-borrowing: with this option, the D&B contractor or the services contractor stands in the shoes of the project company in a dispute with the public body. The project company usually has limited involvement, should be indemnified for any legal costs incurred, and will obtain an outcome binding under the relevant contracts. Given that the D&B contractor and/or the services contractor bear the bulk of the workload and risk, name-borrowing is infrequently used.
- The suite of PFI and PPP contracts will normally include an interface agreement providing for horizontal dispute resolution as between the D&B contractor and/or the services contractor, with the project company assuming the role of an interested spectator. Again, this option is largely risk free for the project company and will deprive the D&B contractor and/or the services contractor of the opportunity to deploy some of the tactical arguments in related disputes outlined above, hence the use of interface agreements is likewise uncommon.
- The project company could enter into an informal alliance with either the public body, the D&B contractor or services contractor along the lines that, as allies, they would each accept the outcome of a bilateral adjudication. However, public bodies are consistently hostile to this sort of arrangement and a working alliance between the project company and the D&B contractor and/or the services contractor will generally require a level of trust and cooperation that is frequently lacking, a situation often superinduced by the underlying dispute.

Generally speaking then, with related disputes, the project company will find itself tied to a procrustean procedural bed that is time consuming, expensive, laboured and susceptible to substantive challenge. Nonetheless, a decision handed down by the Technology & Construction Court in January 2024 offers some small hope of easing this burden for project companies: that

decision is *Lancashire Schools SPC Phase 2 Ltd v Lendlease Construction (Europe) Ltd & Others*.<sup>1</sup>

### The Lancashire Schools dispute

This decision concerned a series of PFI project agreements entered into with Lancashire County Council for educational premises in Burnley. The project agreements provided for disputes to be resolved by adjudication with the option to go to court within 90 days of any adjudicator's decision. For related disputes, the project agreements provided that the project company could include in disputes with the council any submissions made in any similar issues disputes with the D&B contractor and/or the services contractor. In respect of those issues, the decision of the project agreement adjudicator would be binding on the D&B contractor and/or the services contractor.

When defects began to occur in the new schools, the project company was threatened with deductions by the council and, in turn, notified claims against the D&B contractor who, in reply, asserted that the defects had been caused and contributed to by maintenance failures by the services contractor.

The project company commenced court proceedings against the D&B contractor, the services contractor and the council, contending against the council that the defects issues should be properly resolved in a manner consistent with the resolution of the position under the D&B contract or the services contract, with the council being bound by the relevant findings of the court. The council issued an application for the court proceedings to be set aside, or struck out, in circumstances that they had been commenced in breach of the contractual requirement that all disputes must first be determined by adjudication.

The judge agreed with the council that the project agreement made adjudication a condition precedent to the commencement of litigation, but exercised his discretion to decline to enforce this requirement, allowing the proceedings to continue, including on grounds that:

- The provisions for related disputes in the contracts could be, "... particularly difficult to apply and could well lead to procedural

complications". The judge questioned how effective or useful adjudication would be where the project company would have to simultaneously provide submissions against the D&B contractor and the services contractor, who were each likely to respond that the other was responsible for the defects.

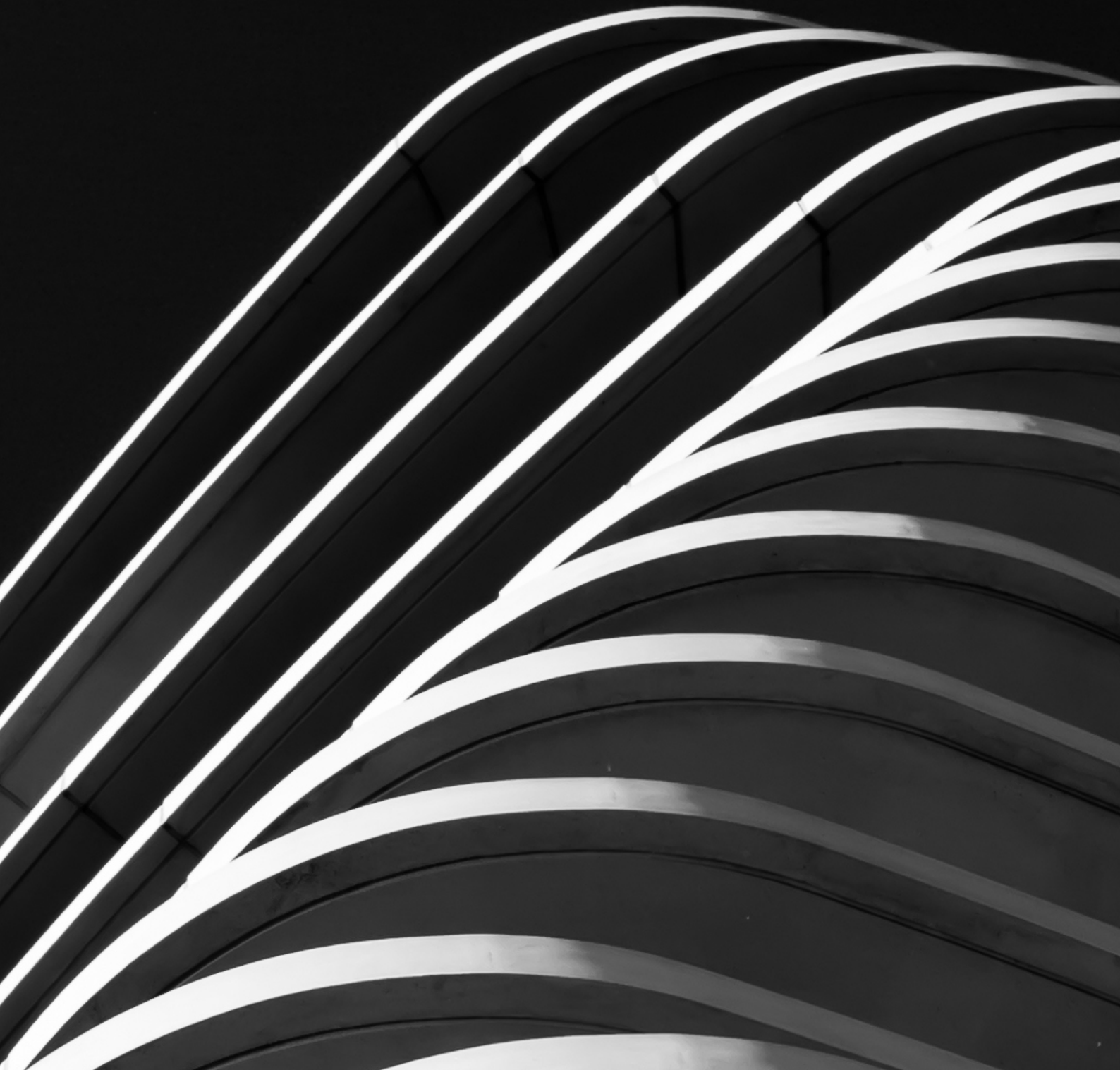
- Both the D&B contractor and the services contractor were content to have the disputes resolved in court and in contrast to the council, were not demanding adjudication first.
- There were parallel proceedings underway in relation to the other project agreements and all proceedings would be delayed if adjudication – which would not be a short process – had to be completed first. Likewise, the prospects for multi-party mediation could be impacted if the council was allowed to first complete adjudication against the project company.
- The complexity of the disputes made it likely that the parties would end up in court after an adjudication in any event.

### Summary

Given the hurdles and risks associated with related disputes mechanisms, the prospect of consolidated court proceedings could appear attractive to project companies. Whilst court proceedings will take much longer than adjudication, and cost more upfront, legal costs may be recoverable and any judgement obtained will unquestionably provide a singular outcome that is binding across all of the contracts.

To be clear, the *Lancashire Schools* decision does not create a precedent entitling project companies to substitute court proceedings for contractual related disputes mechanisms. Each case will still be decided on its own facts with reference to the particular terms of the contracts, which may make court proceedings a distant prospect (for example, where there is an obligation to go to arbitration after adjudication). Nonetheless, this decision should, at least, give project companies food for thought and an opportunity for encouraging public bodies, D&B contractors and services contractors to consider the alternative merits of multi-party court proceedings. ■

**A Closer Look at  
International Arbitration**



# State immunity for the registration of awards under ICSID: Court of Appeal provides clarity

The Court of Appeal has provided clarity regarding whether and when matters concerning state immunity impact on the registration of arbitral awards related to the International Centre for Settlement of Investment Disputes (“ICSID”). As **Katherine Butler** explains, these appeals arose out of the High Court deciding, in two unrelated cases, deciding, for entirely different reasons, that state immunity under English law should not affect the registration of such awards.

## Case Background

On 22 October 2024, the Court of Appeal handed down its judgment in the joined appeals of *Infrastructure Services Luxembourg SARL and Anor v The Kingdom of Spain*<sup>1</sup> and *Border Timbers Limited and Anor v Republic of Zimbabwe*.<sup>2</sup> Both cases concerned applications by the nation states to set aside registrations of arbitral awards pursuant to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “Convention”). In each case, Spain and Zimbabwe respectively claimed that entering adverse ICSID awards against them in the High Court contravened their immunity, as protected by the State Immunity Act 1978 (the “SIA”).

## Legal Background

The Convention provides for disputes in respect of investments between a contracting nation state and a national of another state, to be arbitrated. More specifically, Article 54(1) of the Convention states:

*“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”*

The United Kingdom gave effect to the Convention’s provision through the Arbitration (International Investment Disputes) Act 1966 (the “1966 Act”). As a result, ICSID awards can be registered in the High Court and enforced in the UK in the same way as any other judgment of the national courts.

Separately, s.1(1) of the SIA states that “a State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions...”. Accordingly, unless one of the exceptions in the SIA expressly applies, another nation state cannot be governed by the courts of the UK.<sup>3</sup>

The exceptions that are relevant to these cases are contained at s.2 and s.9 of the SIA:

- Under s.2, a sovereign state can specifically submit to the jurisdiction of the UK courts and thereby waive its immunity; and

- S.9(1) provides that “where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration”.

## The High Court Decisions

In *Infrastructure Services*, Spain received an adverse award to pay compensation of €101 million following its removal of tariff advantages for solar energy providers. This was in breach of its obligations of fair and equal treatment under the Energy Charter Treaty 1994 (the “ECT”). In *Borders*, Zimbabwe was ordered to reinstate expropriated properties to the claimants, as well as to pay US\$30 million in general damages and US\$1 million in moral damages. Both sets of claimants sought and were granted the registration of these awards as High Court judgments, pursuant to the 1966 Act. Spain and Zimbabwe have separately claimed immunity and have sought to have the registrations of these awards set aside.

Spain and Zimbabwe contended that registering the awards would bring each country within the “jurisdiction” of the UK courts and that this was prohibited.

In *Infrastructure Services*, at first instance, Fraser J (as he then was) held that Spain did not have sovereign immunity due to the s.2 exception under the SIA. In signing up to the Convention, Spain had, via Article 54, submitted to the UK courts’ jurisdiction. Further, s.26 of the ECT provided that disputes in respect of the charter, to which Spain is a signatory, would be dealt with via ICSID arbitration. This constituted Spain’s agreement to submit a dispute to arbitration and, therefore, the exception to immunity under s.9 of the SIA also applied. Fraser J was, however, clear that whether or not a valid arbitration agreement was in place would be a matter for the registering judge to determine on the facts.

The approach taken by Dias MJ in *Borders* was very different. In that case, the judge determined that the question of state immunity did not arise. This was because, in registering the ICSID award, the UK court was not taking any “substantive step” against Zimbabwe and, therefore, no adjudicative jurisdiction had been asserted. Rather, the registration of the award was “an essentially ministerial act in compliance with the UK’s international obligations under the ICSID Convention”.<sup>4</sup>

1. [2023] EWHC 1226 (Comm)

2. [2024] EWHC 58 (Comm)

3. *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62

4. See paragraph 106(b) of the *Borders* judgment.

5. *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (High Court of Australia)

6. *Islam v Secretary of State for the Home Department* [1999] 2 AC 629

Accordingly, the registration of the award did not require jurisdiction to be exerted over Zimbabwe as it was simply a functionary outcome of the UK's treaty obligations. Therefore, the question of immunity under the SIA did not arise.

### The Appeals

The Court of Appeal, through the leading judgment of Lord Justice Phillips, dismissed the appeals in both cases.

Firstly, in respect of whether s.1(1) of the SIA was engaged, their Lordships roundly rejected Dias MJ's finding that it was not. At paragraph 38 of the judgment, Phillips LJ set out the position succinctly:

*"In my judgment there could not be a clearer case of the English court exercising its adjudicative jurisdiction over a foreign state than entering judgment against that state on the basis of a decision that the requirements of a United Kingdom statute had been met. It is undoubtedly an 'act of sovereignty' as that phrase was used by the Supreme Court in General Dynamics, and thereby (subject to the further arguments considered below) engages the general immunity afforded by section 1(1) of the SIA."*

Accordingly, both Spain and Zimbabwe, as a starting position, were entitled to state immunity. The follow-up question was necessarily whether any of the exceptions set out in the SIA applied.

Phillips LJ then considered whether, by virtue of Article 54 of the Convention, contracting states had submitted to the jurisdiction of the UK courts for the purposes of the SIA exception at s.2. His Lordship considered, in detail, decisions of the courts of other nation states, particularly that of the Australian High Court concerning the recognition of the same award between Spain and Infrastructure Services.<sup>5</sup> Noting the international component, uniformity of treatment across the relevant jurisdictions was considered beneficial, if at all possible.<sup>6</sup>

On a straightforward reading of Article 54, which requires the unqualified recognition and enforcement of ICSID award, this provision cannot have envisaged excluding enforcement against the contracting state. Circumstances where only the investor party could be subject to enforcement

across different jurisdictions would be perverse. As a result of signing up to the Convention's Article 54, contracting states had specifically submitted to the UK's jurisdiction in respect of ICSID awards and had waived state immunity under s.2 of the SIA.

On the basis that the question of state immunity had been answered, it was not necessary for their Lordships to address whether the exception concerning arbitrations at s.9 was automatically engaged in cases concerning the recognition of ICSID awards. Noting this, Phillips LJ did offer some obiter comments:

*"... it is difficult to interpret section 9 of the SIA other than as imposing a duty on the court to satisfy itself that the state in question has in fact agreed in writing to submit the dispute in question to arbitration. I do not see a legal basis, whether issue estoppel ... or statutory interpretation ... which would justify the court in abrogating that duty and considering itself bound by the determination of the ICSID tribunal as to its own jurisdiction in that regard."*

This reasoning mirrors that of Fraser J in Infrastructure Services where he explained that whether or not there is a valid arbitration agreement in place will turn on the specific facts of that case. Accordingly, there being an ICSID award to be recognised does not automatically mean that the exception at s.9 of the SIA has been satisfied.

### Conclusion

Invoking state immunity in respect of ICSID awards would render the principals of the Convention and, more specifically, the mutual recognition of such awards across jurisdictions, entirely one sided. This was clearly not the intent. Through this decision, the Court of Appeal has made it clear that, while state immunity under the SIA is engaged, ICSID awards are excepted. ■

# arbitrateAD launches in Abu Dhabi

In last year's *Annual Review*, we provided an update on arbitration in the Middle East, following the introduction of the Saudi Centre for Commercial Arbitration (the "SCCA") and amendments to the UAE arbitration law, Federal Law No. 6 of 2018.<sup>1</sup>

As **Shahed Ahmed** and **Leonie Sellers** explain, the arbitration landscape in the Middle East has continued to develop throughout 2024, with the Abu Dhabi Chamber of Commerce and Industry's launch of the Abu Dhabi International Centre (branded as "arbitrateAD"), in December 2023 and the subsequent publication of the rules in February 2024 (the "arbitrateAD Rules").

arbitrateAD replaced the Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC"), Abu Dhabi's previous principal arbitration centre that was established in 1993. From 1 February 2024, all new cases registered with the centre are administered under the arbitrateAD Rules, with existing ADCCAC cases continuing under the ADCCAC Rules until conclusion.

The arbitrateAD Rules reflect international best practice and, it is anticipated, will boost the efficiency, cost-effectiveness, and the expeditious resolution of disputes. arbitrateAD and the arbitrateAD Rules are yet another welcome development to the arbitration framework in the Middle East, enhancing the arbitration offering in the region and the UAE's profile as a regional and global hub for arbitration.

For the purposes of this article, unless the context requires otherwise, all capitalised terms are as defined in the arbitrateAD Rules.

## Key Provisions

### Existing arbitrations (Article 1) and Transitional Provision (Article 53)

As noted, current arbitrations will continue to be administered by ADCCAC. Article 53(2) provides:

*"After the date of entry into force of these Rules, the 2013 ADCCAC Arbitration Rules shall continue to apply to any pending arbitrations being administered under those rules."*

However, any new arbitrations commencing on or after 1 February 2024, for which the parties to a contract have agreed to submit a dispute to ADCCAC, will be administered by the Centre in accordance with the arbitrateAD Rules. Article 1(3) of the arbitrateAD Rules provides:

*"These Rules shall come into force on 1 February 2024 and, unless otherwise agreed by the parties, shall apply to any arbitration which is commenced on or after that date."*

### Multiple Parties, Multiples Contracts, Joinder and Consolidation (Articles 9-12)

As was the case with both the introduction of the SCCA Arbitration Rules in 2023 and the updated Dubai International Arbitration Centre

("DIAC") Rules in 2022, the arbitrateAD Rules introduce the concept of both joinder and consolidation.

The arbitrateAD Rules permit a party to the arbitration or a third party to request the Court to join one or more additional parties to the arbitration. In addition, the Court has discretion to admit an additional party to join if (a) all parties, including the additional party, agree, or (b) the Court is satisfied that the additional party is *prima facie* subject to the Centre's jurisdiction.

Further, under the arbitrateAD Rules, a party may now request the Court to consolidate two or more arbitrations into a single arbitration, subject to meeting certain criteria.

### Seat of arbitration (Article 22)

In the event the parties have not agreed to a seat of arbitration (or a place, which shall, under the arbitrateAD Rules, be the seat), the default seat shall be the Abu Dhabi Global Market ("ADGM"). Article 22(2) states:

*"Failing agreement by the parties on either the Seat or the place of the arbitration, the Seat shall be the ADGM, unless the Court, after giving the parties a reasonable opportunity to be heard, decides otherwise, considering all the relevant circumstances."*

This approach is similar that as adopted under the DIAC Rules 2022, which provides for the DIFC (being an offshore jurisdiction) as the default seat unless otherwise designated.

### Terms of Reference (Article 24)

The Tribunal has discretion to decide whether to issue Terms of Reference either on its own volition or upon the application by a party. The arbitrateAD Rules specifies the issues the Terms of Reference are to include unless otherwise directed by the Tribunal. Like the DIAC Rules 2022, the previous ADCCAC Rules did not make provision for Terms of Reference.

### Emergency Arbitration (Article 35)

A party may seek urgent Preliminary Measures before the Tribunal is constituted and irrespective of whether it has filed a Request. This is a positive step to see the arbitrateAD Rules embrace such measures which aligns with other major institutional rules

1. <https://www.fenwickelliott.com/research-insight/annual-review/2023/arbitration-middle-east>

providing a party to obtain interim measures to prevent irreparable harm.

#### ***Expedited Proceedings (Article 36)***

A further change in approach under the arbitrateAD Rules is the introduction of the concept of expedited proceedings, which was not previously included in the ADCCAC Rules. Broadly in line with the expedited procedure provisions provided for under the DIAC Rules 2022 (as well as the ICC Rules), pursuant to Article 36 of the arbitrateAD Rules, unless the parties agree otherwise, where the aggregate amount of all Claims and Counterclaims do not exceed AED 9 million, the expedited proceedings apply.

This is a welcome inclusion, with lower value claims benefiting from streamlined proceedings which, amongst other things, shall be heard by a sole arbitrator, can be decided on the basis of documentary evidence, and with the final Award being issued within four months from the date the case file is submitted to the Tribunal.

#### ***Scrutiny of Awards (Article 40)***

In line with the ICC and DIAC Rules 2022, Article 40 provides that the Tribunal shall issue a draft Award to the Court for scrutiny. The powers granted to the Court are not as broad as those provided under the ICC Rules, which provide that the ICC Court is entitled to draw attention to points of substance. The Court's power of scrutiny under the arbitrateAD Rules are more in line with the DIAC Rules 2022 and relates to Court scrutinising the form of Award, apparent clerical errors and any inconsistencies in the Award.

#### ***Confidentiality (Article 47)***

The arbitrateAD Rules provide for prescriptive provisions around confidentiality in comparison to the ADCCAC Rules. The provisions provide for a broader group of parties to whom confidentiality applies and sets out clear exceptions. In addition, the Tribunal is empowered to enforce the confidentiality obligations and issue an order or award imposing sanctions, damages or costs and take measures to protect confidentiality.

#### ***Third-Party Funding (Article 48)***

Unlike the ADCCAC Rules which were silent on the point of third-party funding, Article 48 of the arbitrateAD Rules requires the parties to disclose the existence of third-party funders which includes, where relevant, an obligation on

a Claimant to include such information in its request for arbitration. This approach follows in the steps of other major institutional rules, such as ICC and DIAC, and provides much needed clarity in light of the increasing interest in third-party funding in the region.

#### ***Legal Costs (Article 50)***

The issue of whether a Tribunal has the power to apportion costs that include a parties' legal costs and expenses has been the subject of much discussion and contest, with a number of arbitral rules, including the ADCCAC Rules being silent on this issue. Whereas the arbitrateAD Rules provide some much welcomed clarity on this issue, noting that, unless otherwise agreed and at the request of a party, the Tribunal shall apportion the parties' legal costs and expenses between the parties, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

#### ***Conclusion***

The introduction of arbitrateAD and the arbitrateAD Rules signifies yet further development of the arbitration landscape in the UAE. The arbitrateAD Rules are modern, in line with international standards and further provide transparency and clarity on issues that were not addressed in the previous ADCCAC Rules. Whilst it remains to be seen how the changes impact arbitration practice in Abu Dhabi and the UAE as a whole, arbitrateAD and the arbitrateAD Rules have, so far, been positively received. ■

“ *arbitrateAD and the arbitrateAD Rules are yet another welcome development to the arbitration framework in the Middle East, enhancing the arbitration offering in the region and the UAE's profile as a regional and global hub for arbitration.* ”

## The 7th Edition of the SIAC Rules

Between August and November 2023, the Singapore International Arbitration Centre ("SIAC") ran a two-month public consultation on the Draft 7th Edition of the SIAC Rules ("Draft Rules").<sup>1</sup> As **Sana Mahmud** explains, the new SIAC Rules are currently in the process of finalisation and, once in force, will contain important changes which SIAC hopes will enhance user experience and raise the bar on efficiency, expedition and cost-effectiveness in SIAC administered arbitrations.<sup>2</sup>

The Draft Rules contain significant changes to the 6th Edition of the SIAC Rules that have been in force since 2016 ("2016 Rules"). We review some of the key changes and new provisions below which will apply to any arbitrations under the SIAC Rules commenced on or after the date on which the new rules come into force.

### Key Changes

#### *Streamlined Procedure*

The Draft Rules introduce a new "Streamlined Procedure" in Draft Rule 13, in addition to the existing Expedited Procedure.

At the time of filing the Notice or Response, or at any time prior to the appointment of the tribunal, a party can apply to the Registrar to have the arbitration conducted under the Streamlined Procedure, in circumstances where:

- (a) the parties have agreed to the application of the Streamlined Procedure;
- (b) the amount in dispute does not exceed the equivalent amount of S\$1 million at the time of the application; or
- (c) the circumstances of the case warrant the application of the Streamlined Procedure.

An arbitration subject to the Streamlined Procedure will be decided by a sole arbitrator on a documents only basis, without factual or expert witness evidence or a document production process. Consequently, the Draft Rules introduce an ambitious three-month timeframe from the date of the constitution of the tribunal to the issue of the award. There is also a cost benefit with this approach, as SIAC offers a significant 50% saving on the maximum amounts of SIAC's administrative fees calculated in accordance with the Schedule of Fees.

#### *Expedited Procedure*

Perhaps as the result of the introduction of the new Streamlined Procedure for smaller claims, Draft Rule 14.1(b) increases the threshold for the existing Expedited Procedure from S\$6 million to S\$10 million. This change is likely to increase the number of disputes settled through the shorter and more cost-efficient Expedited Procedure.

The Draft Rules also introduces changes designed to make the Expedited

1. [Draft-7-Edition-of-the-SIAC-Rules-Consultation-Draft.pdf](#)
2. [Registrars-Report-Public-Consultation-on-the-Draft-7th-Edition-of-the-SIAC-Rules.pdf](#)
3. [Draft Rules Schedule 1, paragraph 9](#)
4. [Draft Rules Schedule 1, paragraph 14](#)
5. [Draft Rules Schedule 1, paragraph 17](#)
6. [SIAC Annual Report 2023, page 42: https://siac.org.sg/wp-content/uploads/2024/04/SIAC\\_AR2023.pdf](#)

Procedure more efficient, including an express power for the tribunal to limit document production, written submissions and witness evidence.

It should be noted that both the Expedited Procedure and the Streamlined Procedure can be applied to higher-value disputes where the circumstances of the case warrant the application of the Streamlined or the Expedited Procedure; for example, where the dispute in question is relatively straightforward.

The time limit for rendering an award under the Expedited Procedure remains six months.

### Emergency Arbitration

The Draft Rules allow a party to apply for the appointment of an Emergency Arbitrator before filing the Notice of Arbitration. This is a change to the 2016 SIAC Rules, which only allowed a party to apply for the appointment along with, or after, the filing of the Notice of Arbitration.

To prevent abuse of process, the Draft Rules specifies that the party making the application must file a Notice of Arbitration within five days of the application.

In addition to the above, other timeframes have also been shortened, including:

- (a) A party has 24 hours in which to challenge an Emergency Arbitrator.<sup>3</sup> Under the 2016 SIAC Rules, this is two days.
- (b) The Emergency Arbitrator must establish a schedule for consideration of the application within 24 hours.<sup>4</sup> Under the 2016 SIAC Rules, this is two days.
- (c) The emergency arbitrator must issue an order or award within 10 days from appointment.<sup>5</sup> Under the 2016 SIAC Rules, this is 14 days.

These changes are designed to streamline the existing Emergency Arbitration process.

### Consolidation

Pursuant to Draft Rule 16.1(c), arbitrations can now be consolidated where arbitration agreements are compatible and “a common question of law or fact arises out of or in connection with all the arbitrations”. This is a new provision.

The Draft Rules also allow for the consolidation of arbitrations even if they are under different rules (such as UNCITRAL or earlier SIAC rules).

### Coordinated Proceedings

Draft Rule 17 is a new provision which allows coordinated proceedings where the same tribunal is appointed in two or more arbitrations in which a common question of law or facts arises. Pursuant to Draft Rule 17.1, the Tribunal may determine that:

- (a) the coordinated arbitrations shall be conducted concurrently or sequentially;
- (b) the coordinated arbitrations shall be heard together and any procedural aspects shall be aligned; or
- (c) any of the coordinated arbitrations shall be suspended pending a determination in any of the other coordinated arbitrations.

Draft Rule 17.2 makes clear that “[u]nless otherwise agreed by the parties, the coordinated arbitrations shall remain separate proceedings and the Tribunal shall issue separate decisions, rulings, orders, or awards in each arbitration”.

The primary purpose of this provision appears to be to avoid conflicting findings on issues common to coordinated arbitrations without the need for consolidation.

### Early Dismissal

The 2016 Rules already contain an early dismissal procedure pursuant to which unmeritorious claims can be dismissed in the early stages of the arbitration process.

Draft Rule 47.4 shortens the timeframe in which the tribunal must make a decision for early dismissal from within 60 days in the 2016 Rules to 45 days.

### Preliminary Determination

Draft Rule 46 is a new provision which allows a party to apply to the tribunal for a preliminary determination of an issue on a preliminary basis. Whilst parties are free to make such applications under the 2016 Rules, the Draft Rules go one step further and codify the process, encouraging parties to consider making an appropriate application where there is a fundamental issue which warrants such an approach.

In recent experience, SIAC tribunals can be reluctant to provide preliminary determination. This reluctance, perhaps, arises out of cautious approach because of a perceived risk of rendering an

unenforceable award through a lack of due process. This codification may go some way to allaying such fears, and encouraging tribunals to make preliminary determinations which lead to a more efficient and expeditious resolution of the dispute.

### Conclusion

According to the SIAC Annual Report 2023,<sup>6</sup> in 2023, SIAC received:

- 94 requests for the Expedited Procedure, of which 41 were accepted;
- 11 applications to appoint an Emergency Arbitrator, all of which were accepted; and
- nine applications for Early Dismissal, three of which were allowed to proceed, four of which were not allowed to proceed, one application was pending under Rule 29.3 of SIAC Rules 2016. One application was withdrawn. Of the three applications that were allowed to proceed, one application was granted, one was rejected and one was withdrawn.

Once the new rules are in force, it will be interesting to see if the number of applications for the procedures above increase, and whether there is significant take up of the new Streamlined Procedure, contributing to SIAC’s stated aim of creating a more efficient arbitration process. ■

## Churchill and mediation: a job done or room for improvement? A comparative analysis of the positions in England and Italy

The decision of the Court of Appeal in *Churchill*<sup>1</sup> marks a significant and long-anticipated development, particularly in the field of Alternative Dispute Resolution (“ADR”), as it finally established a legal basis for courts to order parties to engage in ADR. There was perhaps a degree of inevitability about this step. Not only had the use of mediation been steadily increasing since 2016, it also had an overall settlement rate of 89%.<sup>2</sup> Add to this the increasing pressures on an overburdened and underfunded court system,<sup>3</sup> and one might ask why it has taken so long.

**Giuseppe Franco** and **Freddy Ashe** begin by summarising the key findings in *Churchill* and the revisions to the Civil Procedure Rules (“CPR”) introduced in October 2024. They then move to a comparative analysis, providing an overview of the statutory mediation framework within the Italian legal system, where mediation plays a more structured and mandatory role. This is contrasted with the current position under English law, where mediation remains largely voluntary but is increasingly encouraged by courts, with the new provisions allowing for judicial orders to engage in ADR.

### The case in *Churchill*

The case involved an allegation that the Council had allowed Japanese knotweed to encroach from its land onto Mr Churchill’s property. At first instance, the Council applied to stay proceedings, arguing that Mr Churchill had failed to engage with its pre-action protocol. While the application was dismissed, the judge granted the Council permission to appeal, reasoning that Mr Churchill had acted unreasonably by bypassing the pre-action protocol and proceeding directly to issuing his claim.

In *Churchill*, the Court of Appeal set out to resolve three main issues. First, it considered whether the first-instance judge was correct in dismissing the Council’s application based on the decision in *Halsey*.<sup>4</sup> The Court determined that the first-instance judge’s reliance on *Halsey* – specifically, the reasoning that compelling parties to mediate would obstruct their right of access to court – was *obiter dictum* rather than *ratio decidendi*, and thus did not need to be followed.

Second, the Court considered whether the judge could lawfully stay proceedings or order the parties to engage in a non-court-based dispute resolution process. The primary concern was whether this would infringe on claimant’s right to a fair trial under Article 6 of the European Convention on Human Rights. However, after analysing several cases from the European Convention on Human Rights and Court of Justice of the European Union, the Court ruled that such an order would not violate this right, provided it serves a legitimate aim and is proportionate to achieving that aim. Consequently, the Court concluded that, as a matter of law, the authority exists to stay proceedings or require the parties to engage in non-court-based dispute resolution processes.

Third, after confirming that the authority exists, the Court turned to the question of when such a stay should be granted. Many factors were deemed to be relevant, including those suggested by the Bar Council. Significantly, the Court affirmed that it should not “lay down fixed principles as to what will be relevant to determining those questions [as] it would be undesirable to provide a checklist or score sheet for judges to operate”.<sup>5</sup> The Court emphasised that judges are well-equipped to determine what is necessary to ensure a fair, efficient, and cost-effective resolution of the dispute.

As a result, the Court concluded that the decision to stay should be considered by judges on a case-by-case basis, taking into account all relevant circumstances.

### The CPR changes following Churchill

Following *Churchill*, the CPR Committee launched a consultation on ADR, resulting in rule changes that took effect on 1 October 2024. The key revision is to CPR 1.4 (i.e. the overriding objective), which now provides that dealing with cases justly and at proportionate cost includes “ordering and encouraging the parties to use ADR”. In line with this, CPR 3.1 has been amended to empower courts to “order the parties to engage in ADR”, a power now also reflected in the courts’ ability to give directions to this effect at the case management conference.<sup>6</sup> Lastly, CPR 44.2 now requires courts, when making cost orders, to consider “whether a party failed to comply with an order for ADR, or unreasonably failed to engage in ADR”.

### The position in Italy

Like many other jurisdictions, Italy has long recognised the benefits of mediation and ADR. In 2010, following input from Parliament, the Italian Government enacted legislative decree No. 23 (the “Decree”), which established out-of-court mediation as a mandatory precondition for court litigation in specifically identified civil law matters.<sup>7</sup>

Since the Decree’s enactment, plaintiffs have been subject to a statutory duty to attempt mediation before proceeding to court. If this obligation is not fulfilled, the judge will adjourn the hearing for up to three months<sup>8</sup> to allow parties to commence the mediation procedure. The consequences are severe for the party that fails to attend the initial mediation session. If the absent party is the plaintiff, the judge must declare the claim inadmissible, effectively ending the proceedings. Additionally, the judge may order the non-compliant party to bear the costs of the proceedings.

To prevent any censure for limiting access to justice, the Decree provides several checks and balances. Most importantly, the duty to mediate does not fully obstruct the parties’ access to court, as the only requirement is that parties attend the initial mediation session. If the first meeting proves unsuccessful, parties are free to resume court proceedings. Moreover, the filing of a mediation request interrupts the statute of limitations, thereby securing the parties’ rights if mediation fails. Finally, the

Decree ensures confidentiality, stipulating that information disclosed and declarations made during mediation cannot be used as evidence in any subsequent court proceedings.

The Decree extends these features to cases where mediation is required by contract<sup>9</sup> or where the judge, at their discretion, orders the parties to attempt mediation. In such instances, mediation can become a mandatory precondition even if the statutory duty under the Decree does not directly apply to the matter.

In essence, the Italian system encourages parties to engage in mediation without restricting their right to pursue claims in court. One might say that the system gently nudges parties out of the courtroom.

### Comparative analysis and commentary

It is clear that England and Italy have come to appreciate the value of mediation and other ADR mechanisms, as both systems broadly recognise the court’s authority to order parties to engage in non-court-based dispute resolution. Given the systemic differences between civil and common law, it is unsurprising that the legal basis for this authority is founded in distinct sources. In England, although now firmly embedded in the CPR, the authority originally stemmed from case law.<sup>10</sup> In Italy, judges draw their power from legislation, specifically from the Decree.

However, when it comes to deciding how and when judges should exercise this authority and how the mediation process should be structured, England and Italy have taken different approaches.

Through the enactment of the Decree, Italy has adopted a systematic approach by precisely identifying the civil law matters to which the statutory and mandatory duty to attempt mediation applies. Under this framework, the courts do not have discretion; if a matter falls within the scope of the Decree, the parties are required to attempt mediation before proceeding to court regardless of the circumstances. Moreover, the Decree established a highly structured and formalised procedure, setting specific duties for the parties, their lawyers, and mediators, as well as rules concerning the duration of the process and its interplay with the statute of limitations and any subsequent court proceedings. For instance, these rules cover matters of evidence-taking and confidentiality.

In contrast, in England and Wales, there is no legislation governing mediation. Instead, a series of judicial decisions have gradually shaped the courts’ approach to mediation, guided by the overriding objective of the CPR. At the same time, the mediation process has been pieced together by the initiatives of individual entities, both private and public, aimed at promoting the use of ADR. This has resulted in a somewhat fragmented framework, where each institution – and sometimes even individual mediators – adopts its own preferred procedure. Whilst this lack of uniformity may cause some uncertainty, it is not necessarily a drawback. Mediation, like many other ADR mechanisms, offers value by allowing parties the flexibility to tailor the process to their specific needs. This is why the Decree establishes certain mandatory rules, but still grants parties the freedom to select the mediation rules for their procedure, provided they ensure confidentiality and the impartiality of the mediator.<sup>11</sup>

However, one might argue that certain aspects of the English mediation framework could benefit from a more systematic approach, similar to that adopted in Italy. By “systematic approach”, we mean the establishment of clear rules, something that the Court of Appeal in *Churchill* notably refused to do. One area that could benefit from such overarching rules concerns the question of when judges should exercise their authority to order parties to engage in mediation.

*Churchill* affirmed that this should remain a matter of judicial discretion, with various factors influencing each case. While this flexible approach allows for nuance, it risks creating an inconsistent system shaped by differing court decisions. A system aiming to promote ADR should not only protect claimants’ access to justice, but should also ensure that the advantages derived from engaging in the ADR process are accessible to all parties, regardless of the specific circumstances. One way to achieve this is by establishing clear criteria for when the duty to attempt mediation applies along with enforcing strong sanctions for non-compliance, as the Decree does in Italy.

Another area for potential improvement is the interplay between mediation and the statute of limitations. Currently, under English law, the commencement of mediation does not pause the limitation period for bringing a claim. If parties wish

to suspend the limitation period to attempt mediation, they may enter into an agreement to that effect, a “standstill agreement”, which suspends or extends the statutory or contractual limitation period. In the alternative, the claimant can issue a protective claim before the expiry of the limitation period and then request an immediate stay of the proceedings to enable a mediation to take place.

### Conclusion

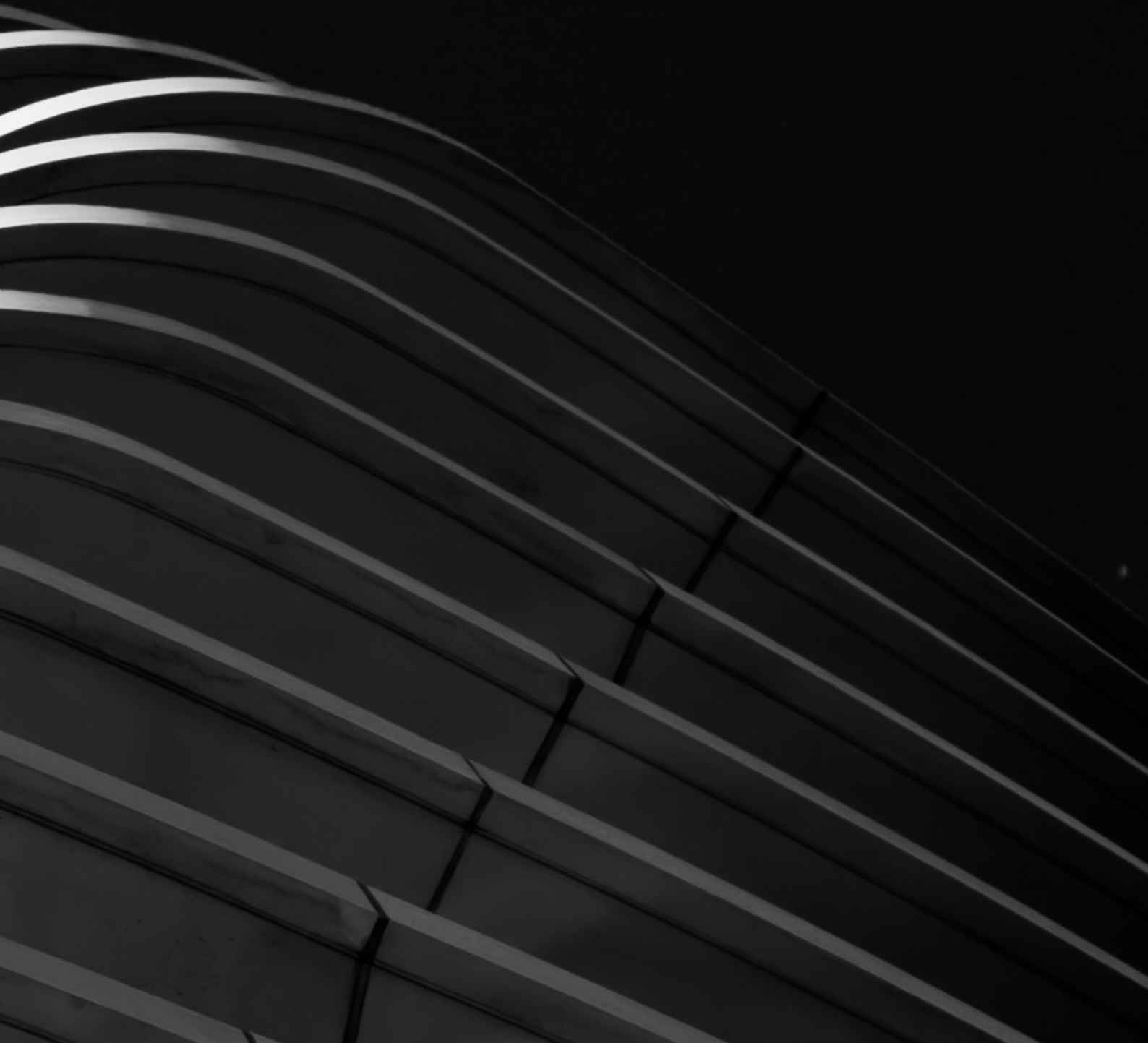
In 2008, the Master of the Rolls, Sir Anthony Clarke, said: *“It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. ... what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not”*.<sup>12</sup> Sixteen years late in 2024, the *Churchill* decision, and its impact on the practice of mediation, finally brings this adage into sharp focus. English courts are now empowered to order parties to engage in mediation, it remains to be seen what circumstances and factors will be deemed relevant in exercising this power. Given the wide discretion courts still retain regarding when to order mediation and when to issue cost orders to sanction parties, the outcomes could be inconsistent, potentially leading to dissatisfaction among users.

In such context, Italy’s model may offer valuable lessons for the establishment of clear principles on when mediation should be mandatory, ensuring broader and more consistent access to the benefits of mediation. By adopting a more structured framework, particularly in areas such as the timing of mediation, the consequences of non-compliance, and the impact on issues like the statute of limitations, English law could enhance its system and improve the overall effectiveness of mediation as an ADR tool. ■



*Mediation, like many other ADR mechanisms, offers value by allowing parties the flexibility to tailor the process to their specific needs.*

1. *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416
2. In 2016, 41% of mediators and 43% of lawyers saw an increase in mediation (Centre for Effective Dispute Resolution).
3. Between 2010 and 2019, over half of the courts in England and Wales were closed.
4. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576
5. *Churchill* [66]
6. CPR 28.7(1)(d) for the fast track; 28.14(1)(f) for the intermediate track; 29.2(1A) for multi-track.
7. Legislative decree no. 149 of 2022 has recently enlarged the scope of application of this statutory duty, which now applies to: condominium; rights in rem (*diritti reali*); division of assets; inheritance; family arrangements; leases; loans; medical and sanitary malpractice; defamation; insurance, banking and financial contracts; partnerships; consortia; franchising; contract for works; network contracts; supply contracts.
8. That is the minimum statutory duration of the mediation procedure.
9. Although the enforceability of a clause prescribing mediation as a precondition to litigation can always be subject to debate.
10. See authorities in *Churchill* [49].
11. Article 3
12. *The Future of Civil Mediations*, (2008) 74 *Arbitration* 4, 419.



## What is conflict avoidance and why is it becoming more and more important?

One of the more interesting roles **Jeremy Glover** has been involved in over the past few months was to help organise the first Conflict Avoidance Coalition Conference which took place on Wednesday, 2 October 2024 at Portcullis House, at the Houses of Parliament. Around 150 professionals from across the construction industry, contractors, subcontractors, suppliers, representatives from the Cabinet Office, Environment Agency, TfL, and the Houses of Parliament Restoration & Renewal, gathered together with consultants and representatives from a number of professional organisations, including the RICS, CIARB, ICE and DRBF. Jeremy explains more.

I was at the first Conflict Avoidance Coalition Conference (the "Conference") as a result of my role as President of the Dispute Resolution Board Foundation ("DRBF"). The DRBF was one of the founding members of the Conflict Avoidance Coalition Steering Group ("CACSG") back in January 2018. This is, perhaps, unsurprising given the important role Dispute Boards can play in dispute avoidance. Indeed, the UK Construction Playbook states that:

*"dispute avoidance boards are a potential way to avoid and manage disputes more effectively and, where appropriate, should be engaged with projects from inception to completion."*

Dispute Boards can promote dispute avoidance on projects in a number of ways. Clause 21.3 of the 2017 Second Edition of the FIDIC Rainbow Suite empowers the parties to make a joint request to the re-named Dispute Avoidance & Adjudication Board ("DAAB"): *"to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract"*.

This informal assistance can take place during any meeting, site visit or otherwise. But the role of the Dispute Board should never simply be confined to this, valuable though it is. Dispute Boards can collaborate with the parties and assist in the early identification, control and management of potential disagreements before they develop into a formal dispute.

And it is this role which is closer to conflict avoidance, which, of course, is why the DRBF was one of the original CACSG members. But the idea of conflict avoidance goes further still. The Conflict Avoidance Toolkit<sup>1</sup> very helpfully outlines the differences between dispute avoidance and early intervention:

- *Dispute Avoidance is about stopping the smoking embers of a dispute by bringing them to the attention of people who can do something about them.*
- *Early Intervention is about snuffing out the smoking embers before they ignite into a fire."*

It is interesting that, increasingly, the standard forms are providing some assistance to encourage parties to do this.

Proactive risk management is encouraged by NEC4 15.1 which provides that:

*"The Contractor and the Project Manager give an early warning by notifying the other as soon as either becomes aware of any matter which could: Increase the Price, delay Completion, delay meeting a Key Date, impair the performance of the works in use."*

The NEC4 form also has an optional clause highlighting climate change, X29.3 which states that:

*"The Contractor and the Project Manager give an early warning by notifying the other as soon as either becomes aware of any matter which could adversely affect the achievement of the Climate Change Requirements."*

Arguably, this is covered by the original early warning provisions, but the importance of sustainable issues rightly merits a separate distinct clause.

FIDIC has adopted a similar provision, and sub-clause 9.1 of the new JCT Design and Build Contract, 2024 edition ("JCT DB 2024"), whilst not going so far as NEC and FIDIC, now states that its aim is the *"avoidance or early resolution of disputes"*. It requires the prompt notification of any matter *"that appears likely to give rise to a dispute or difference"*, and provides for a tiered form of dispute resolution; for example, the use of Senior Executives who are required to hold meetings *"as soon as practicable for direct, good faith negotiations to resolve the matter"*.

Tiered resolution can be very effective, but it can only come into play once a dispute has arisen. That is only the final part of the conflict avoidance process. Conflict avoidance is all about putting mechanisms into place to avoid the conflict in the first place.

This is why the Conflict Avoidance Toolkit sets out the five stages of the conflict avoidance process. Adopting conflict avoidance requires a commitment to:

1. work proactively to avoid conflict and to facilitate early resolution of potential disputes;
2. work collaboratively and use early intervention techniques to resolve differences of opinion before they escalate;
3. embed conflict avoidance mechanisms into contracts;

1. [https://www.rics.org/content/dam/ricsglobal/documents/dispute-resolution-service/conflict\\_avoidance\\_toolkit.pdf](https://www.rics.org/content/dam/ricsglobal/documents/dispute-resolution-service/conflict_avoidance_toolkit.pdf)

2. <https://www.rics.org/dispute-resolution-service/conflict-avoidance/conflict-avoidance-pledge>

4. develop capability in the early identification of potential disputes and in the use of conflict avoidance measures; and
5. promote the value of collaborative working with partners to identify, promote and apply conflict avoidance mechanisms.

So, what does working collaboratively actually mean? The JCT DB 2024 embraces ideas about collaborative working. Article 3 states:

*“The Parties shall work with each other and with the other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect. To that end, each shall support collaborative behaviour and address behaviour which is not collaborative.”*

So, this is helpful but, again, no definition is given. A good example can be found in the work of the UK BIM Alliance, who talk about Information Management in light of International Standard, BS EN ISO 19650:

*“The success of construction projects boils down to the parties involved and how well they work together to meet both their own objectives and those of the project. Working together not only involves the regular exchange of information but also understanding what happens to the information once it is passed on; this is fundamental in ensuring it is created to meet a purpose ... Collaborative working requires us to communicate and be transparent with each other, to plan what we are doing as a team. Effective planning also allows information to be re-used for multiple purposes resulting information cascaded up, down and across project teams.”*

When parties are collaborating, exchanging information and communicating, they are more likely to be working together and will be better placed to work to identify potential issues before they become disputes. Again, this is a key part of what conflict avoidance is all about.

Our distinguished keynote speaker at the Conference, Sir John Armitt, like many of the other speakers, stressed that collaboration is all about communication, people and relationships. Sir John Armitt also reminded us all that it is the early stage of any project which sets the tone

and is determinative of how that project proceeds.

Some have questioned the involvement of lawyers in CACSG. I am not so sure why. At Fenwick Elliott (and this is true of many other construction lawyers), I think it is fair to say that we would always try to look for the best way to avoid and resolve disputes satisfactorily without the need to begin formal proceedings. That is our client’s aim, and should always be ours. Of course, if a dispute does arise, we will aim to run it efficiently and decisively while still looking, if possible, to avoid full formal proceedings.

This is all in line with the Conflict Avoidance Toolkit. When advising on the initial phases of projects, if you look to include conflict avoidance mechanisms into contracts, then you can help facilitate the early resolution of potential disputes and also collaborative working. Remember, it is the early stage of the project which can set the tone.

Spreading the word about the work of the CACSG and encouraging the implementation of the Conflict Avoidance Pledge is, I think, a part of the process of advising a client about the best ways to try and avoid disputes. Good project management is, of course, one of the best of those tools, but that needs to be supported by the provisions of your contract.

Finally, there is the Conflict Avoidance Pledge (“CAP”)<sup>2</sup> which now has serious momentum. Think about the wide range of attendees at the Conference – people from every part of the construction industry. This year, some 400 organisations have signed the pledge. Part of the pledge reads:

- *“We believe in collaborative working and the use of early intervention techniques throughout the supply chain, to try to resolve differences of opinion before they escalate into disputes.*
- *We recognise the importance of embedding conflict avoidance mechanisms into projects with the aim of identifying, controlling, and managing potential conflict, whilst preventing the need for formal, adversarial dispute resolution procedures. We commit our resources to embedding these into our projects.”*

I suspect most people would agree with these sentiments. And, of course, what matters is not signing the pledge but actually working to implement it. That means not just expressing support for collaborative working and the use of early intervention techniques to resolve differences, but embracing that commitment to identify, control and manage potential problems. This has the advantage that, by doing so, you increase your chances of avoiding disputes in the first place.

So, what might be done to encourage the use of CAP? Well, let’s turn back to the Construction Playbook, which states that:

*“[CAP] ... demonstrates commitment to conflict avoidance and the use of amicable resolution procedures to deal with emerging disputes at an early stage. Contracting authorities **should** adopt the appropriate provisions as a standard clause in all public works contracts, and use this mechanism to resolve problems before these escalate into disputes”* [Emphasis added].

Note the mandatory use of “should”. We should, therefore, start seeing government-backed parties looking to adopt CAP in their contracts. That is a good step, but what is equally important is that this approach feeds down to all (sub) contracts. Sir John Armitt’s final message was an important one for anyone. He encouraged us: “to move forward not with hope but real ambition”.

It will be interesting to see what happens in 2025. ■

## The increasing demand for data centres

Consumer demand for access to digital data has grown substantially in the last decade with the evolution of technology in our increasingly digitalised world. The outbreak of COVID-19 impacted significantly on this demand, as the pandemic led to a move towards remote working, which in turn increased the need for fast and reliable access to data. The surge in online shopping, the rapid advance of artificial intelligence and the implementation of 5G networks have all led to the need for additional data centres to store and distribute data. But how, asks **Lyndon Smith**, can this be done?

Virtually all data that is stored, processed and distributed to consumers, and all data flowing across the internet, goes through a data centre. Data centres are the home of cloud and artificial intelligence systems and are heavily reliant on electricity and cooling systems to ensure they can run, distribute and store the vast data that they hold. In short, data centres comprise a warehouse facility fitted out with extensive mechanical and electrical equipment, including IT hardware and software. For this reason, data centres are extremely power intensive.

The geographical location of the consumer is vital to the speed of data delivery; the closer the consumer is to the physical data centre, the faster the data is received. This is because the latency levels are lower. Latency, or network latency, is the delay before a transfer of data begins – it is essentially the length of time a system waits to receive data before delivering it to the user. The lower the latency level, the faster the data is transferred, which results in a more efficient data centre. It is for this reason that the UK market is predominantly London-based, although there is currently a shortage of data centres in and around London to meet the increase in demand.

It is, therefore, unsurprising that data centres are on the rise and are making up a larger share of the construction market. This is welcomed by the construction industry as larger-scale public sector projects decrease and the housing market slows. Data centres are also attractive to developers and investors as they are seen as less susceptible to recessionary pressures due to their vital role in information infrastructure.

As a result, we are seeing more of our clients move into this market.

### **Issues to be considered in the construction of data centres**

#### *Whether to retrofit or rebuild*

Retrofitting data centres avoids the need to locate a new site and tackle planning laws. However, the main concern is whether the original equipment, such as the cooling systems, will function compatibly with the latest modern equipment. This can cause difficulties in contract negotiations between the developer and contractor regarding who takes the risk of compatibility.

#### *Powering the data centre*

The continuous power necessary to operate the systems that hold the data, and the associated cooling systems,

is often greater than what the grid provider can deliver. This can cause higher latency levels and, therefore, problems for providers. To help counter this, the UK government has announced a significant increase in investment to the National Grid to provide additional capacity.

#### **The lack of skilled labour**

Although there are several established contractors with data centre experience, there remains a general lack of skilled labour in the industry. The construction of a data centre is specialised, with complicated mechanical and electrical fit out works, as already mentioned above. Therefore, not all contractors are able to do this work. Proposals for greater investment in modular and prefabricated construction methods and AI solutions have been made to help solve the problem. However, these proposals are yet to be implemented.

#### **Programming**

Given the complexity of constructing a data centre owing to the highly technical nature of the work, it is not unusual for there to be programming issues between the parties, causing delays and, in turn, disputes. Therefore, it is imperative for parties to be aware of who carries the risk for delay-related events. Parties should be *au fait* with their notice provisions and timings for the substantiation of any claim in the event that, for example, a contractor is delayed and needs to apply for an extension of time and a loss and expense claim.

#### **The risk of human error**

Upgrading a data centre is essential to keep up with the increase in consumer demand. However, a major problem with updates and upgrades is human error. To mitigate the risk of human error, it is important to diligently plan and supervise any updates and upgrades that are required as well as to enforce strict adherence to industry best practices. Data centre providers should also ensure their employees receive proper training to make certain that human error does not occur during day-to-day management.

#### **The risk of fire**

The design, construction, operation, management and specification of fire protection is crucial. A fire outbreak can be catastrophic. In March 2021, a fire broke out in a data centre in Strasbourg causing losses of more than €105 million. The fire affected 65,000 customers, who were unable to access their data. The

operator suffered reputational damage, which impacted its value. The incident highlighted some of the main challenges faced when a fire breaks out in a data centre, such as the lack of automatic fire extinguisher systems and the delay in electrical cut off, which makes it difficult for firefighters to extinguish the fire.

The fire itself is not the only issue posed by a fire outbreak within a data centre: there is also the lack of continuous power that electrical cut off causes in the course of extinguishing the fire. Any cut in power may lead to breaches of contract, given the obligation to provide customers with continuous power. The lack of continuous power also causes cybersecurity concerns as the systems are more vulnerable and susceptible to cyberattacks.

#### **National Security and Investment Act 2021**

For obvious reasons, data infrastructure has been identified as a sector which could give rise to national security concerns. The National Security and Investment Act has implemented a notification regime whereby individuals or companies acquiring data centres must notify the government in certain circumstances so the government can assess potential national security risks. There are two parts to the notification regime, as follows:

- The first is a mandatory notification regime where certain acquisitions crossing specified thresholds must be notified and cleared before completion can take place. An example includes the acquisition of all shares in a data centre.
- The second is the voluntary notification regime which applies where acquisitions of interests, that are not caught by the mandatory notification regime but present potential national security concerns (e.g. the land neighbours a data centre facility used by the UK government), need to be notified (but do not need approval for completion), and may be called in within five years for a national security assessment. If a party does not know whether their acquisition presents a potential national security concern, they can submit a voluntary notification with the view of obtaining confirmation from the UK government.

The government has powers to investigate not just data centre transactions, but also

the acquisition of property as well as the leasing and the financing of data centres.

#### **Key takeaways**

It is unquestionable that the development of data centres is on the rise and, given the complicated and technical nature of these projects, we are seeing an increase in disputes associated with data centres. The common themes we are experiencing are disputes resulting from changes in the scope of works (generally increased scope), which impacts on programming and the date for completion; delays because of late technical design information; delays because of the late provision of technical equipment to be installed; defects in the installation of equipment resulting in the data centre not operating as intended; and problems associated with power demand and cooling.

Therefore, although these are exciting times given the opportunity that the development and construction of data centres provide for many of our clients, they do come with a necessary health warning. ■

# 'Great British Energy' and the challenges in meeting Britain's ambitious renewable energy targets

Britain's newly elected Labour government has pledged to make Britain a clean energy superpower by doubling onshore wind, tripling solar power and quadrupling offshore wind by 2030. **Edward Foyle** explains more.

## Britain's renewable energy targets

This growth will be supported by the creation of a new 'Great British Energy' which will receive £8.3 billion of government investment in the next five years and which published its founding statement on 25 July 2024. Britain is not alone in seeking to develop large-scale renewable energy projects and reduce its need on fossil fuels: global spending on renewable energy projects tripled in the four years from 2019, from a little over US\$500 billion in 2019 to approximately US\$1,750 billion in 2023.<sup>1</sup> Given the exponential rate at which the industry has already grown in the UK and the competing demand for renewable projects internationally these are hugely ambitious targets.

Great British Energy's founding statement,<sup>2</sup> declares that it will help to achieve these targets by performing five functions:

1. Project investment and ownership: Great British Energy will invest in and own clean power generation assets with a particular focus on investment in projects using less developed technologies like floating wind and carbon capture.
2. Supporting project development, including through a partnership with The Crown Estate. This support could include, for example, carrying out land assessments, environmental surveys and securing planning consent and grid connections, allowing the private sector to focus on construction works.
3. A Local Power Plan, which will develop smaller- and medium-scale renewables projects (presumably such as onshore wind and solar) at a local level, easing the burden of national energy transmission.
4. Improving the supply chain within the UK, such that key clean energy projects will be built using domestic manufacturing and supply chains.
5. Exploring how Great British Energy can work with Great British Nuclear (a body established in March 2023 to provide specialist capability and skills to meet the government's nuclear programme).

This article briefly considers some of the challenges the Labour government and Great British Energy will meet in seeking to meet those targets, both in terms of projects' original costs and some of the

1. Analysis by JP Morgan, referenced in *The Financial Times*
2. <https://www.gov.uk/government/publications/introducing-great-british-energy/great-british-energy-founding-statement>
3. <https://www.cornwall-insight.com/press-and-media/press-release/solar-and-wind-to-account-for-just-44-of-power-generation-by-2030/>

issues that can result in renewable energy projects having cost overruns.

### Project costs

Renewables projects continue to be expensive and the market remains challenging. In the UK's last offshore wind auction in September 2023, not a single developer was attracted by the maximum guaranteed price of £44 per megawatt-hour (MWh). In response, the last British government was compelled to increase the maximum guaranteed price by 66%, to £73 per MWh, in Allocation Round 6. Another high-profile indication of the challenging market conditions is Ørsted's cancellation of two large offshore wind projects off the New Jersey coast in October 2023, leading to a US\$4 billion write down.

Financing is one of the key issues impacting projects' costs. Renewable projects' cost profile, particularly that of solar and wind projects, is front loaded: project development is expensive, but once the project is operational its fuel is free of charge. Renewables projects are debt financed, with the majority of the players in the renewables industry not having the same robust balance sheets as companies in the oil and gas sector, for example. Financing costs are therefore critical to the overall success of renewable projects and it is no coincidence that the exponential growth of renewable energy in the last 15 years has occurred in a low interest rate environment. Low interest rates enabled developers to bear the high upfront costs. As manufacturers gained more industry experience and technology became more established, those upfront costs decreased, making projects more viable. Higher interest rates inevitably mean higher project costs.

Construction costs have also increased in recent years. As inflation has soared, contractors have been required to bear the increased labour costs and surge in costs of materials – such as steel, polysilicon (a key material in solar panels) and oil (essential for transportation costs) – caused by supply constraints resulting from COVID lockdowns and the war in Ukraine. Although inflation may be reducing, many of these costs remain high. Contractors often have to provide a fixed price for their works in order to provide costs certainty to lenders, and therefore have to account for risks such as these in their pricing.

Great British Energy's mandate to invest in and own renewable projects might

help the industry move away from a reliance on debt financing and the impact that this model has on projects' costs. However, the government's energy targets are so large that, at the time of Great British Energy's launch, *Cornwall Insight*<sup>3</sup> estimated that an additional £48 billion would be required to meet its targets. Great British Energy's £8.3 billion backing may therefore be insufficient to make a significant move away from the industry's reliance on private sector debt, such that projects' costs would remain high.

### The risk of cost overruns

Renewable projects also have a significant risk of cost overruns. Unsurprisingly, the Queen Mary University's 2022 Future of International Energy Arbitration Survey Report identified design & performance issues and supply chain issues (including the pricing of materials) as the two major causes of disputes on renewable energy projects. These two issues will continue to pose significant challenges.

Many renewables projects are first-of-their-kind projects, using cutting-edge technology that is often untested. Failures in the technology or designs can have drastic results on a project's costs and schedule. Although base technology may now be more established and more reliable, the increased scale and ambition of projects required to meet the government's targets – and Great British Energy's specific mandate to invest in and own projects using developing technologies – means that technical challenges and the risk of cost overruns and delays will always be present. For example, offshore wind farms are now located farther from shore in deeper waters, presenting new installation challenges for the foundations, turbines and cabling, and with larger components, creating manufacturing challenges for the turbines and monopile or jacket foundations. Floating offshore wind and solar projects create numerous additional challenges.

Renewables projects have large and complex supply chains, many – such as offshore wind – also have significant interface risks. These projects also bring numerous disciplines, contract packages and parties together. A stretched supply chain brings the risk that suppliers may over commit and ultimately be unable to deliver equipment/components on time which may significantly impact (or halt) progress. In addition, given the rate at

which the market is growing many of the parties will be new participants in the market and therefore prone to experience issues with project delivery. Each interface between these parties and disciplines presents a risk of default, which may have a significant impact on project delivery and cost. Supply chain issues will be a risk for even the most straightforward of projects, such as the planned development in onshore wind and solar, which could be delayed if equipment and parts are not delivered or are not of the required quality. Great British Energy is therefore right to identify that significant investment will be needed in supply chains within the UK. However, supply chains on all major projects are international in nature. Great British Energy's aim that projects are built using domestic supply chains therefore appears ambitious.

A further separate challenge is upgrading the grid to receive and transmit additional power, which will require a network to extend to locations where projects are based and run east to west (to receive power generated offshore). The National Grid has announced a £60 billion investment programme over the next five years to improve the network. A failure to complete these works in good time may, in turn, prevent completion of renewable projects, causing delays and further cost overruns.

### Conclusion

There are many factors for Great British Energy to consider when investing in projects. Key issues for it to consider when investing in projects will be whether it is willing to finance projects itself and whether it is willing to bear itself any of the risks of project overruns (only some of which are considered in this article). Project costs might be reduced if Great British Energy is willing to take on some of the risks of costs overruns, such as certain supply chain risks, rather than adopt the debt financing approach of passing all risks down the contractual chain, which can result in higher original project costs. If contractors and developers are not prepared to assume these risks themselves, given the high demand that will be placed on the supply chain through the sheer number of projects (both in the UK and globally), Great British Energy may find that it has no choice other than to assume many of these risks. ■

# Navigating the future of energy projects with EPCM contracts

As the world faces uncertainty caused by recent global events, the construction industry addresses the question of whether traditional contracting models remain workable. **Edward Foyle** and **Oliver Weisemann** consider whether EPCM contracts, such as the new IChemE Blue Book,<sup>1</sup> are suitable for managing complex energy projects, especially in the transition to renewable energy.

Recent global shocks, such as supply chain and performance issues caused by COVID-19, the wars in Ukraine and the Middle East, and global surges in the price of materials and energy costs, have caused many in the construction industry to query whether the Engineering, Procurement and Construction ("EPC") contracts model remains workable. For contractors, EPC contracting on a fixed sum basis can mean huge cost overruns, whilst for employers the promise of delivery of a project on time and at a defined contract price is often an illusion burst by numerous claims, variations and other asserted contractual entitlements.

For large and complex projects, which combine parties from multiple disciplines and from multiple jurisdictions, an alternative to EPC contracting is contracting on an Engineering, Procurement, Construction and Management ("EPCM") basis. Whereas an EPC contract (such as the FIDIC Silver Book) imposes entire responsibility and control of a project on a single contractor, in an EPCM contract, the employer instead engages a contractor to design and manage the project and engages various contract packages for the construction works directly, resulting in an employer having a number of contractual relationships.

Following the growth in use of bespoke EPCM contracts, the first standard form EPCM contract was released by the Institution of Chemical Engineers ("IChemE") in May 2023. The IChemE Blue Book is intended for use for process plants. FIDIC is also producing its own standard form EPCM contract, which was due to be published by the end of 2023, but is still pending publication as of the date of this article. FIDIC's publication of a standard form may make use of EPCM contracting more popular still. This article considers the suitability of EPCM contracting specifically for use in the global effort to transition from fossil fuels to renewable forms of energy.

Some of the most significant challenges facing the construction of energy projects are the huge demands on global supply chains, the allocation of risks – due to both the increasingly large scale of projects – and high construction costs. EPCM contracting can help overcome these challenges.

In terms of risk allocation, in today's market, and given the scale and ambition of many of the projects required to meet the energy transition, even the most prominent contractors are unable to take on the risk associated with delivery of a large energy project on an EPC basis, particularly if the project is a first of its kind. Even if a contractor were willing to take on such risks, a prudent employer would need to be comfortable with all project risks sitting with a single entity (no matter how strong) given the disastrous consequences failure of an EPC contractor could have on a project. Engaging multiple parties allows risk to be apportioned – and money to flow down contractual chains – in an appropriate, and more manageable way through the size and scope of the contract packages.

A significant advantage of EPCM contracting, which can be particularly valuable in the energy sector, is the increased speed of procurement. Procurement lead times of the complex types of plant in energy projects such as reactors, turbines and condensers are notoriously long. In an EPC arrangement, this may be exacerbated further by protracted negotiations with the EPC contractor, after which point the EPC contractor will need to produce a detailed design, following which it will be able to commence procurement and commence construction works. In an EPCM arrangement, it is possible to have the design completed by a separate consultant and commence procurement before the contract packages have been engaged. This feature of EPCM contracting can help an employer avoid delays in project commencement that could otherwise be caused by delayed delivery of key plant and equipment to site as a result of the current strains on global supply chains.

An EPCM arrangement should also reduce the costs of a project, at least at the outset, as each contractor and consultant engaged will have less of a need to allow a risk contingency in their price. By contrast, given the lessons of the last few years, there is more need than ever for EPC contractors to allow a significant risk contingency in their price – particularly if a project is a first of its kind. In addition, contracting direct may allow an employer access to a broader pool of contractors (including some an EPC contractor may not be willing to engage as a

1. <https://www.fenwickelliott.com/research-insight/annual-review/2023/review-icheme-blue-book-2023>

subcontractor), leading to more competitive pricing of contract packages.

There are, of course, risks to EPCM contracting. Those risks are significant and make it only suitable for experienced employers.

Ultimately, the success of an EPCM project will depend upon the employer's active engagement in it. Although the EPCM contractor will assist the employer in matters such as procurement, construction management, payment and the like, the employer will have ultimate control of and responsibility for key decisions. An employer must therefore factor into the cost of the project the costs that it will have to incur itself to engage a skilled project management team – which will be essential to ensure that the project and various contract packages are kept under control (working alongside the EPCM) and external consultants, such as lawyers.

The employer's active role is also vital because, unlike an EPC contractor, which is subject to fitness for purpose obligation, an EPCM contractor's duties are limited to performing its obligations with reasonable skill and care (or an enhanced version thereof). An EPCM does not have an absolute obligation to ensure successful project delivery. Establishing that a consultant's services were not performed with reasonable skill and care is extremely difficult. An employer must therefore recognise that if the project were not delivered successfully, it would be challenging to prove a claim against its EPCM contractor.

Dispute proceedings are also likely to be more extensive and more complicated than proceedings against an EPC contractor. In an EPC arrangement, if there is a defect or completion is delayed, there is a single entity against which the employer may bring a claim. Under an EPCM arrangement, risk is spread across a range of contractors and the EPCM. Determining liability between these entities may not be straightforward. For example, complicated legal disputes may arise relating to causation – where more than one party is in breach of contract and potentially at fault for a defect / loss suffered by the employer. As the standard EPCM contract contains only reasonable skill and care obligations, the employer is likely to have to go through dispute resolution proceedings with the contractors that performed the works

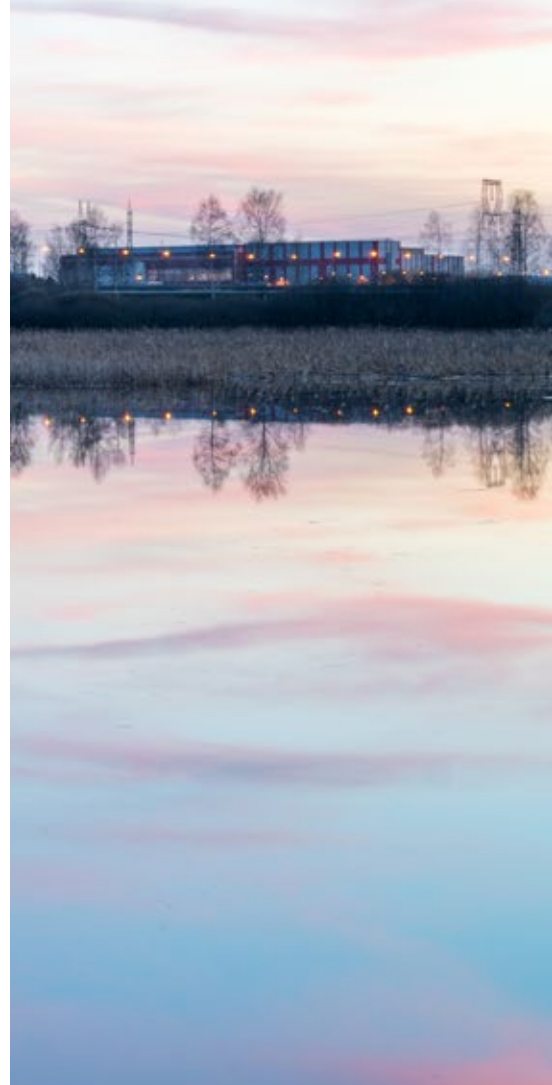
before bringing a claim against the EPCM. The employer also risks being dragged into multiple arbitration proceedings by the various contractors. Given the risk of multiple proceedings it will be important for the employer to ensure that joinder provisions are included in the arbitration agreements so that related parties can be forced to participate in the proceedings and the risk of inconsistent decisions by different arbitration tribunals is removed.

The employer may also have to accept that it will retain some risk. Careful drafting of the contract packages will be required to ensure that there are no gaps in liabilities and appropriate contractual caps are in place. However, where works are divided across contract packages it may not be possible to impose a single simple obligation that the works as a whole be fit for their intended purpose and will have a defined design life, as is standard in EPC contracts. If that overarching obligation sits with the EPCM contractor it may be reduced from a fitness for purpose obligation (which guarantees the outcome), to a reduced obligation of reasonable skill and care.

In order to meet the huge demand and scale of energy projects for construction works in the coming years EPCM contracting is likely to be increasingly used. The publication of standard forms is recognition of this increased use. Major players in the energy industry should have the skills and expertise required to take on the active role the employer must fulfil. A key question is whether they, and their financiers, will be willing to take on the risk of potential increases to a project's cost. It may be that only employers with large and diverse portfolios are willing to take those risks. For employers that are willing to have a bit more "skin in the game" and that have the balance sheet to allow them to do so – such as Great British Energy – EPCM contracting may allow more ambitious projects to be delivered and collaborative relationships developed with contractors. ■



*Ultimately, the success of an EPCM project will depend upon the employer's active engagement in it.*



# From promise to practice: how AI shaped construction law in 2024

In 2024 construction law continued to see remarkable advancements in its use of AI. **Stacy Sinclair** reports on the increasing use of AI and, with the assistance of a generative-AI tool, an inaugural conference on AI & Construction Law held at the Technology and Construction Court in London.

## Introduction

A year ago I published an article titled *"AI is about to completely change construction law"*.<sup>1</sup> While the "complete change" I boldly anticipated of course has not materialised within just one year, construction law in 2024 certainly has witnessed remarkable advancements, driven by the growing use of AI.

For the record, I did say in the 2023 article that it would take two to five years for the transformation, as generative AI at that point was at the "peak of inflated expectations" on the Gartner Hype Cycle 2023.<sup>2</sup>

The Gartner Hype Cycle is a graphic representation of the maturity and adoption of technologies and applications, and how they are potentially relevant to solving real business problems and exploiting new opportunities.<sup>3</sup> Those technologies in the "peak of inflated expectations" are predicted to reach mainstream adoption within two to five years, the "plateau of productivity".

Now, in the recently released Gartner Hype Cycle 2024, we see generative AI has moved into the "trough of disillusionment".<sup>4</sup> This means interest in the technology is waning and investments shift to those providers who improve their products to the satisfaction of the early adopters.<sup>5</sup> It also means that generative AI is still on course, moving through the expected cycle, heading towards mainstream adoption at which point, I suggest, we will see a transformed industry.

In 2024, the focus certainly has shifted to putting AI into practice. Both legal and construction professionals in the industry are starting to realise and bring to life the transformative potential of AI. While discussions and debates around AI's opportunities and risks continue, the industry is forging ahead, exploring how to implement AI responsibly and safely to drive innovation, reduce time and costs, and ultimately enhance quality.

This article looks briefly at the growing landscape of applications of AI in construction law, along with the inaugural conference on AI & Construction Law, recently held at the Technology and Construction Court.

1. Sinclair, S (2023) *AI is about to completely change construction law*, Fenwick Elliott. Available at: <https://www.fenwickelliott.com/research-insight/annual-review/2023/ai-change-construction-law>
2. Gartner (2023) *Gartner places Generative AI on the peak of inflated expectations on the 2023 hype cycle for emerging technologies*, Gartner. Available at: <https://www.gartner.com/en/newsroom/press-releases/2023-08-16-gartner-places-generative-ai-on-the-peak-of-inflated-expectations-on-the-2023-hype-cycle-for-emerging-technologies>
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5. <https://www.gartner.com/en/research/methodologies/gartner-hype-cycle>

### AI & Construction Law: Applications

AI is already part and parcel of many applications and services we regularly use, whether we are aware of it or not. From facial recognition to unlock mobile phones, personalised feeds on social media and movie recommendations on Netflix to self-driving cars and smart home devices, AI is now widespread in our everyday lives.

In terms of construction law, the possibilities too are ever growing and AI applications are available throughout the lifecycle of a construction project: project identification, stakeholder engagement, design, procurement, contract management, construction, commissioning and operation. The diagram in Figure 1 provides some examples in each of these areas.

In addition, should complaints or grievances escalate into claims, parties and their representatives can benefit from AI tools throughout the lifecycle of a dispute. The diagram in Figure 2 provides an overview of the areas where AI has the potential to enable more efficiency and productivity in the dispute process, if used responsibly, safely and ethically.

### AI & Construction Law: Joint AI Seminar Series

To advance the industry's knowledge and application of AI, the Technology and Construction Court ("TCC"), King's College London, the Technology and Construction Solicitors' Association ("TECSA"), the Technology and Construction Bar Association ("TECBA"), the Society of Construction Law and the Society for Computers & Law have joined forces and established an AI Seminar Series.

The first seminar was held on 10 October 2024 at the Rolls Building in London, focusing on the construction industry's current use of AI and what we can expect to see in the near future. Speakers from architectural, engineering and contracting firms were invited to speak to provide an initial overview of where the industry is at with its use of AI and where it is headed.

Mr Justice Waksman, Judge in Charge of the TCC, opened the seminar. Peter Brogden (Barrister at Keating Chambers), Martha Tsigkari (Head of Applied R&D at Foster + Partners), Pedro Rente Lourenco (Group Head of Data & Analytics at Laing O'Rourke) and Caro Ames (Data Science Strategy Lead

## POSSIBLE USE CASES FOR AI IN A CONSTRUCTION *PROJECT* LIFE CYCLE

### Project Identification

- **Site selection:** analyse geographic, economic and environmental data
- **Feasibility studies:** assess market demand, regulatory requirements and risks
- **Trend analysis:** identify emerging trends in infrastructure needs

### Procurement

- **Supplier/bid selection:** evaluate supplier performance, cost, and compliance
- **Cost prediction:** forecast material and labour costs and assist with budgeting
- **Risk assessment:** identify risks in performance, cost and/or delay

### Construction

- **Monitoring progress:** the use of drones and other technology to track progress
- **Health & Safety:** detection of hazards on site in real time to reduce accidents and increase compliance
- **Handover documentation:** automating the creation of as-built documents

### Stakeholder Engagement

- **Stakeholder mapping:** identify key stakeholders and their interests and influence
- **Sentiment analysis:** evaluate public sentiment to gauge support or resistance
- **Chatbots:** provide information and gather feedback from stakeholders

### Contract Management

- **Contract analysis:** review and analyse contracts for compliance and administration
- **Risk monitoring:** track key performance indicators (KPIs) and contract obligations
- **Automated reporting:** generate real-time reporting on progress and compliance

### Operation

- **Predictive maintenance:** monitoring assets to predict and prevent failures
- **Performance optimisation:** analyse energy consumption to adjust usage and achieve savings
- **Usage analytics:** track behaviour and usage patterns to optimise asset performance

### Design

- **Generative design:** generate options for optimising design factors (e.g. cost, sustainability)
- **Clash detection:** AI-enabled BIM to analyse potential clashes prior to construction
- **Energy modelling:** predict energy performance and optimise design

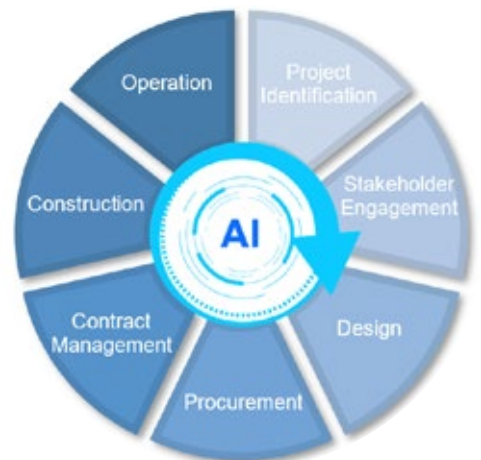
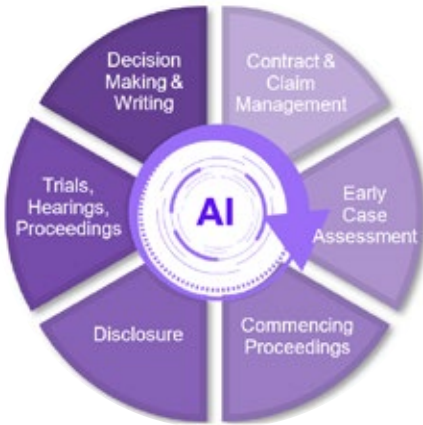


Figure 1

## POSSIBLE USE CASES FOR AI IN A CONSTRUCTION *DISPUTE* LIFE CYCLE



### Decision Making & Writing

- **Drafting:** suggested text for awards or judgments based on prior rulings and relevant case law
- **Predictive outcomes:** offering insight on similar disputes
- **Streamline judicial process:** categorising cases and extracting data to bring more cases to a faster resolution and address backlog issues

### Contract & Claim Management

- **Contract review & drafting:** analyse contracts for compliance/ risk assessment
- **Predicting claims:** analyse patterns in project data and contract terms to predict potential claims
- **Contract admin & monitoring:** track adherence to obligations, notification of possible breaches

### Commencing Proceedings

- **Drafting pleadings:** assistance with drafting claims, defences, boilerplate sections, etc.
- **Jurisdiction or tribunal selection:** analyse prior judgments and rules to recommend the best forum or tribunal
- **Strategy:** analyse opponent’s case and suggest possible strategies and arguments

### Trials, Hearings & Proceedings

- **Real-time document analysis:** provide instant summaries, insights and counter-arguments in real-time during proceedings
- **Transcription and summarisation:** real-time data to assist in efficiency and preparation in proceedings

### Early Case Assessment

- **Legal research:** AI-assisted legal research on legislation, case law and guidance, within legally trained models and databases
- **Automated chronologies:** extraction of key dates and events from documents
- **Assess position:** evaluate large data sets of project data (emails, reports, schedules, etc.) to determine liability, etc.
- **Evidence review:** classify project data, surface insights and identify key documents
- **Outcome prediction:** estimate likely outcomes and settlement ranges based on precedent cases and analytics

### Disclosure

- **eDisclosure:** tools to expedite the document review process, identifying relevant and not relevant documents
- **Privileged documents:** flagging potentially privileged documents for review
- **Data visualisation:** visual representations of patterns in data/ documents to surface insights or identify key events or parties

Figure 2

at Arup) each provided insights into the use of AI at their respective firms, challenges faced and opportunities for the future of AI. Following these presentations, Mrs Justice Joanna Smith chaired a panel discussion.

The next seminars will be held in 2025, and are likely to focus on the legal industry’s use of AI in the dispute process, along with the opportunities, challenges and issues of data. The dates are expected to be confirmed soon.

The following is a brief, high-level summary of the first seminar in October 2024, generated by AI.

### **PART 1: Insights and Innovations – exploring our industry’s present and future**

*Disclaimer: The following summary is the output from a generative AI tool, based on the recording and transcription of the seminar. Only typographical errors in the spelling of the speakers’ names have been corrected. Otherwise, the following is the direct output to demonstrate the capability of AI. This summary is neither approved nor endorsed by the speakers.*

#### Summary

The seminar focused on the current and future use of AI in the construction industry, featuring speakers from various sectors. Key points included the role of neural networks and transformers in AI advancements, the importance of data quality and governance, and the ethical considerations of AI deployment. Specific applications discussed were generative

design, predictive systems, and large language models. Concerns about data sharing, bias, and liability were raised, with solutions like anonymization and governance frameworks proposed. The discussion also highlighted the potential for AI to enhance efficiency but emphasized the need for human oversight to avoid over-reliance and maintain professional expertise.

#### Outline

##### **Introduction and Overview of the Seminar**

Speaker 1 [Mr Justice Waksman] introduces the seminar, highlighting its focus on the construction industry’s use of AI and its future prospects.

The seminar is supported by various organizations, including TCC, TECSA, TECBAR, King’s College London, Society of Construction Law, and Society for Computers and Law.

Speaker 1 [Mr Justic Waksman] introduces the speakers: Peter Brogden, Martha Tsigkari, Pedro Rente Lourenco, and Caro Ames, and mentions that Peter Brogden will use an AI platform for his introduction.

The format of the evening includes talks by each speaker, followed by a Q&A session chaired by Mrs. Justice Joanna Smith.

### ***Introduction of Peter Brogden and AI Demonstration***

Speaker 2, Peter Brogden, introduces himself and mentions the use of an AI co-host.

The AI co-host introduces Peter Brogden and the other speakers, highlighting their expertise in AI and the construction industry.

Peter Brogden explains the purpose of his talk, which is to introduce AI and explain its foundations, particularly neural networks and transformers.

He uses a neural network analogy to explain how AI recognizes patterns and makes predictions, emphasizing the importance of data and dimensions in AI training.

### ***Explanation of Neural Networks and AI Capabilities***

Peter Brogden elaborates on the structure of neural networks, including neurons, weights, and dimensions.

He explains how AI models like GPT-3 and GPT-4 are trained using vast amounts of data and transformers to analyze data at various levels of attention.

Brogden discusses the different types of AI, including generative AI, which can generate new text, images, and videos, and autonomous AI, which can perform tasks and solve problems.

He provides examples of AI applications in various fields, such as text-to-speech and speech-to-text conversion, and autonomous AI in self-driving cars.

### ***Martha Tsigkari's Presentation on AI in Architecture***

Martha Tsigkari from Foster + Partners discusses the impact of AI on the architecture industry, emphasizing the importance of data in driving AI advancements.

She explains the three key factors driving AI adoption: data, computational power, and adoption rate.

Tsigkari highlights the various AI applications in architecture, including generative design, surrogate models, and large language models for document search.

She discusses the potential of AI to revolutionize the architecture industry, particularly in design and operational efficiency.

### ***Pedro Rente Lourenco on Deploying AI in Construction***

Pedro Rente Lourenco from Laing O'Rourke discusses the challenges and implications of deploying AI in the construction industry.

He explains the different types of machine learning: supervised learning, unsupervised learning, reinforcement learning, and generative AI.

Lourenco emphasizes the importance of having a robust data infrastructure, including cloud platforms, data governance, and data quality architectures, to support AI deployment.

He discusses the risks associated with AI, such as bias, privacy, and security, and the need for governance models to manage these risks.

### ***Caro Ames on AI in Infrastructure and Data Sharing***

Caro Ames from Arup discusses the role of AI in delivering sustainable outcomes across the built environment.

She highlights the challenges of data sharing in the construction industry and the need for trustworthy and standardized data sharing infrastructure.

Ames provides examples of AI applications in infrastructure, such as digital twins for energy sector transition and document management systems for legal capabilities.

She emphasizes the importance of building capabilities and governance frameworks to support AI adoption and ensure data quality and security.

### ***Panel Discussion on Data Sharing and AI Risks***

The panel discusses the risks and challenges of data sharing in the construction industry, including confidentiality, bias, and privacy concerns.

Peter Brogden and Martha Tsigkari emphasize the importance of having data governance frameworks and legal

structures to manage data sharing and AI deployment.

Pedro Rente Lourenco and Caro Ames discuss the need for capability building and understanding the value and risks of data to support better data sharing practices.

The panel also addresses the potential impact of AI on job roles and the importance of maintaining domain expertise and professional judgment in AI-assisted decision-making.

### ***Liability and Ethical Considerations in AI Use***

The panel discusses the liability implications of using AI in the construction industry, particularly in the event of disasters or errors.

Peter Brogden and Pedro Rente Lourenco emphasize the importance of professional judgment and accountability in using AI tools.

Caro Ames highlights the need for assurance processes and learning and development to ensure that AI is used ethically and effectively.

The panel also addresses the potential for AI to reinforce biases and the importance of building diverse and inclusive data sets to avoid these biases.

### ***Future of AI in Construction and Final Thoughts***

The panel discusses the future of AI in the construction industry, including the potential for AI to automate processes and improve efficiency.

Martha Tsigkari and Pedro Rente Lourenco emphasize the importance of continuous learning and adaptation to stay ahead of AI advancements.

Caro Ames highlights the need for strategic planning and collaboration to drive AI adoption and ensure long-term benefits.

The panel concludes with a discussion on the importance of ethical considerations and the need for a balanced approach to AI deployment in the construction industry. ■

## 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 go to [www.fenwickelliott.com](http://www.fenwickelliott.com). If you would like to receive a copy every month, please contact **Jeremy Glover** or sign-up online <https://www.fenwickelliott.com/subscribe>.

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.

### What was the interplay between a “conclusive evidence” provision and adjudication proceedings?

*Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd* [2024] EWHC 591 (TCC)

Judge Nissen KC explained that the key issue here was the interplay between a “conclusive evidence” provision, and adjudication proceedings issued for the purposes of preventing that provision from taking effect. The contract was the JCT Design & Build Subcontract Agreement 2011, as amended.

Following practical completion, on 21 October 2022, the construction manager provided a statement of the Final Sub-Contract Sum. On 21 November 2022, QFS gave notice that it disputed the content of that statement in its entirety. QFS started three adjudications within a short space of time, No. 8 on 25 November, and Nos. 9 and 10 on 15 and 16 December 2022.

On 19 December 2022, QFS issued another Adjudication Notice. The dispute referred was: “the calculation of the Final Sub-Contract Sum i.e., the true value of the Final Sub-Contract Sum”.

QFS calculated the Final Sub-Contract Sum at £71,587,425 plus VAT. On 22 December 2022, the contract manager issued a Final Payment Notice identifying a Final Sub-Contract Sum of £31,041,884 excluding VAT.

The judge noted that clause 1.8.1 provided that a Final Payment Notice was conclusive of various matters listed unless clause 1.8.2 (“the saving provision”) was engaged. The saving provision was engaged if (amongst other things) adjudication proceedings were commenced prior to or within 10 days after the receipt of the Final Payment Notice. Adjudication No. 11 was commenced a few days before receipt of the Final Payment Notice. Accordingly, in theory, the saving provision was engaged. However, the Referral was not served within seven days, but in May 2023. As a result, BPP claimed that the Final Payment Notice had become evidentially conclusive.

What happened was this: In light of the three ongoing referrals, there were concerns about the timing of Adjudication No. 11. The parties therefore agreed that QFS was obliged to serve the Referral on 13 January 2023 unless an

unforeseen or unforeseeable reason arose which precluded service on that date. If that happened, there would be an extension to deal with the issues that had arisen.

QFS did not serve the Referral on 13 January 2023. QFS was, therefore, in breach of its obligation to serve the Referral on that date. No explanation for delay was given by QFS at the time. On 31 January 2023, QFS said that it intended to issue its Referral in another two weeks or so. It still gave no reason for the further delay. BPP gave notice to QFS that it now required service of the Referral within a reasonable time. That did not happen. Therefore, the prosecution of an effective adjudication based on the Notice dated 19 December 2022 was bound to fail because QFS had not served its Referral by the agreed date.

BPP said that, as a result, the proceedings validly commenced by the Notice of Adjudication dated 19 December 2022 had reached a conclusion. Therefore, the proceedings were a nullity and so concluded. They had come to an end, but the Final Payment Notice remained unchanged as there was no decision or settlement which impacted upon it.

QFS said that clause 1.8.2 did not require a decision, award, or settlement in order for the first part of the saving provision to be effective. Proceedings only reached a conclusion once and if there had been either a decision or a settlement. When that occurred, the Final Payment Notice took effect subject to those matters. Here, the adjudication proceedings were concluded by the decision issued in September 2023.

The judge said that clause 1.8.2 worked like this. The first phase of the saving provision in clause 1.8.2 was engaged upon the commencement of relevant proceedings and continued to apply until the subject matter of proceedings had been concluded. Then the second phase of the saving provision was applicable. Clause 1.8.2 used the expression “subject matter” in respect of the scope of that which was, pending a decision or settlement, not caught by the conclusive evidence. This showed the importance placed by the contracting parties upon the content of the underlying dispute. The clause, as a whole, contemplated that proceedings had to be commenced and, thereafter, concluded, albeit, the parties did not intend that the first phase could continue to infinity.

In the context of clause 1.8.2, “conclusion” meant either a decision, award, or judgment, or a settlement. Therefore, a “conclusion” did not include the ending of an adjudication, which had become a nullity. The Final Payment Notice did not have conclusive effect in relation to the subject matter of those adjudication proceedings pending their conclusion. The judge noted that:

*“The conclusive effect of the Final Payment Notice will have been challenged by the commencement of proceedings and, pending their conclusion, there is no conclusive effect given to the Final Payment Notice in respect of its subject matter. That is what the first phase of the saving provision says. However, one way or another the proceedings which have been commenced will yield a conclusion, thereby engaging the second phase, unless they have been abandoned in the meantime.”*

What mattered was that the decision was responsive to the subject matter of the dispute raised within time in respect of the Final Payment Notice.

The consequence of this was that, although the adjudication started on 19 December 2022 became a nullity because QFS failed to serve its Referral by the date which had been agreed, it had no bearing on the question of whether the adjudication proceedings had reached a conclusion.

*“Standing back, I consider this outcome strikes the right balance between, on the one hand, recognising the benefits of a conclusive evidence provision ... and, on the other hand, allowing a true value of the works to be undertaken and paid for on the other. BPP had known that the Final Sub-Contract Sum was in dispute even before the Final Payment Notice was issued. In accordance with clause 1.8.2, QFS had challenged the Final Payment Notice within time. From that moment, BPP will have understood that it could not, by that shortcut, obviate the need for the parties to investigate the true value of the account. That exercise was duly undertaken by the adjudicator.”*

However, if the adjudication proceedings which had been timeously commenced pursuant to clause 1.8.2, were subsequently abandoned, then the saving provision would fall away.

Here, the judge noted that the principal reason that QFS did not serve a Referral on 3 February 2023 was because it erroneously concluded that it did not need to. It was not because it intended to abandon the adjudication proceedings commenced on 19 December 2022. Further on, 3 February 2023, BPP proposed a without prejudice discussion to settle the account. Throughout the exchanges which followed, QFS made it clear that they intended to pursue Adjudication No. 11 unless a settlement could be reached.

The discussions ended on 5 May 2023 when QFS said that they were going to reissue Adjudication No. 11. This was done on 10 May 2023. The Notice was in materially identical terms to the December Notice of Adjudication and advanced the same dispute as the first Notice. It could not be said that QFS was dragging its heels or that BPP was dissatisfied with the speed at which the discussions were taking place.

The result of all this was that the judge enforced the adjudicator’s decision, reached in September 2023, awarding QFS some £3.2 million.

### **Would the court exercise its discretion to set off or withhold enforcement of an adjudication decision on the basis of a second decision?**

***CNO Plant Hire Ltd v Caldwell Construction Ltd***  
[2024] EWHC 2188 (TCC)

The case here followed the hearing of CNO’s application for summary enforcement dated 21 March 2024 of an adjudication decision dated 5 March 2024. Caldwell invited the court to exercise its discretion to set off or withhold enforcement of the decision on the basis of a second adjudication decision dated 14 April 2024. Caldwell did not make any jurisdictional challenge or allege that there had been any breach of natural justice.

In the first adjudication, Caldwell had not issued a payment notice or pay less notice in response to an interim payment application made in December 2023. The first adjudicator decided that the amount stated in the application of around £253k was due, plus interest and costs. Caldwell did not pay that sum and referred a

further dispute to a second adjudication seeking the “proper valuation of the final account” dating from September 2023, and repayments of any sums found to have been overpaid by CNO. Caldwell requested that a valuation be made in respect of the same items considered in the first adjudication.

CNO said that the second dispute related to the same, or substantially the same, subject matter. The adjudicator disagreed and made a decision that Caldwell pay CNO £90k. Caldwell paid £64k, asserting that they were entitled to withhold statutory CIS contributions from the payment.

Kelly J referred to the “well-established” legal principles applicable to adjudication enforcement set out by O’Farrell J in *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC) (see [Dispatch, Issue 263](#)):

- “(1) Where a valid application for payment has been made, an employer who does not issue a valid payment notice or pay less notice must pay the ‘notified sum’ in accordance with section 111 of the Act;*
- (2) Failure to pay the notified sum entitles the contractor to seek payment of the sum by obtaining an adjudication award;*
- (3) Unless otherwise directed by the adjudicator, the parties are required to comply with the decision immediately;*
- (4) The courts take a robust approach to enforcement, regardless of errors of procedure, fact or law, unless in excess of jurisdiction or breach of natural justice;*
- (5) When a party is required to pay a ‘notified sum’, that party may embark upon a true valuation of the work done, but only after it has complied with the immediate payment obligation under section 11 of the Act.”*

No one disagreed with this. Instead, Caldwell argued, on a factual basis, that the second adjudication did not relate to the same payment cycle because it related to the September 2023 application and was for the valuation of the works. The first adjudication related to CNO’s December 2023 application.

When it came to set off, the judge referred to the decision of Smith J in *FK*

*Construction Ltd v ISG Retail Ltd* [2023] EWHC 1042 (TCC):

*"The general position is that adjudicators' decisions which direct the payment of money by one party to another are to be enforced summarily and expeditiously ... No set off or withholding against payment of that amount should generally be permitted ...*

*... There are, however, at least three limited exceptions to this general position:*

- (i) a first, 'relatively rare', exception will be where there is a specified contractual right to set off ...*
- (ii) a second exception may arise where it follows logically from an adjudicator's decision that the adjudicator is permitting a set off to be made against the sum otherwise decided to be payable ...*
- (iii) a third exception may arise in an appropriate case, at the discretion of the court, where there are two valid and enforceable adjudication decisions involving the same parties whose effect is that monies are owed by each party to the other ..."*

CNO said that, as Caldwell had not issued enforcement proceedings in respect of the second adjudication, the court could not exercise its power to order a set off. Caldwell said that it had raised the issue of set off in its evidence in response to CNO's application to enforce the first adjudication.

Kelly J was clear that it was "not appropriate" for the court to consider exercising its power to order a set off here. Caldwell had not argued either of the two usual defences to enforcement: a lack of jurisdiction or a breach of natural justice, instead inviting the court to exercise its discretion and order a set off:

*"Set off is not generally permitted in respect of an adjudicator's award. Such awards are to be enforced summarily and expeditiously."*

The judge also referred to the guidance given by Akenhead J in the case of *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC) who had set out the steps that needed to be taken for the court to determine questions of set off. The first was for the court to decide whether both decisions were valid. If not, or if it could not be determined whether each was valid, it was unnecessary to go further. Here, CNO had it made it plain

that the second adjudicator did not have jurisdiction. No application had been made by Caldwell to determine whether or not that was correct.

Although this was sufficient to deal with the issue, the judge went on to consider the merits of the set-off argument. The judge said that Caldwell's argument that the true value adjudication decided in the second adjudication was not in respect of the same payment cycle as the first adjudication because it dealt with an application of a different date was "too simplistic".

Here, it was "immediately clear" from consideration of the disputes referred in the two adjudications that the subject matter and the sums claimed were the same. All of the work which was the subject matter of the interim payment applications of September and December 2023 had, in fact, been completed by mid-2023. Although the first adjudication was made on a smash and grab basis, the adjudicator decided that CNO had notified a sum in its interim payment application which was not the subject of a payment notice or a pay less notice. The first adjudicator, amongst other issues, decided that if sums claimed and included in the December 2023 interim payment application were incorrect for any reason, Caldwell could and should have issued a payment notice or a pay less notice so that those amounts did not become due:

*"When the parties agree that all of the work had been done and they were in a final account process, it is wholly artificial to assert that the payment cycles were different."*

Finally, the judge did not agree that Caldwell was entitled in any event to deduct money to take account of statutory CIS payments. If either adjudicator had intended those deductions to be made from the decision, that would have been set out in their decision.

### Expert evidence

***Glover & Anor v Fluid Structural Engineers & Technical Designers Ltd & Ors* [2024] EWHC 1257 (TCC)**

We have discussed this case before, see *Dispatch*, [Issue 283](#). The main dispute related to damage to neighbouring properties following renovation works, including the creation of a new basement. The parties were given permission to call

structural engineering and quantum expert evidence.

During the finalisation of the joint statement of the structural engineering experts, AXA's expert expressed concern that there appeared to have been involvement from the Glovers' lawyers which resulted in "significant changes" to the experts' views. Following correspondence between the parties' solicitors about the issue, the claimants' solicitors conceded that their conduct was not fully in compliance with the applicable rules and/or guidance.

AXA said that the claimants should prepare an application seeking permission to change their expert, which must include provision of disclosure of the instructions to the first expert, including in relation to the joint statement and the proposed changes to the draft statement. The claimants' application did include drafts of the changes made to the joint statement. The judge drew attention to an email from the claimants' solicitors which included:

*"Please see attached our amends to the joint statement. I accepted Howard Tucker's previous changes and made our amends in track (but I have removed the metadata so it doesn't show PMC made the amends).*

*You will see the amends are with the intention of staying faithful to the pleaded issues rather than the plethora of objections raised by [...] which are more appropriate for the comment boxes. We have also covered off other pleaded issues which the engineering experts are expected to cover including all pleaded theories of negligence and the remedial workscope ...*

*We would be grateful if you could review and confirm if you agree with the changes and where you wish to make further changes to the statements and your comments, to make these."*

The judge referred to the applicable principles to joint statements to be found at paragraph 13.6.3 of the TCC Guide:

*"Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the*

*court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement."*

The judge noted that what was clear from the correspondence was that the claimants' solicitors believed it was permissible to amend the draft statement where it was thought the content did not reflect the pleaded issues and said the same to AXA's lawyers:

*"Such a belief, however misguided, is not the same as a deliberate and knowing disregard of the applicable principles."*

The real difference between the parties was the circumstances in which permission should be given for a replacement expert and the conditions to be attached to any such permission. When considering what to do, the judge did so on the basis that the facts disclosed *"substantial and impermissible interference in the expert statement process"* which was contrary to both authority and the applicable guidance issued by the TCC.

The judge also had regard to the overriding objective of enabling the court to deal with cases justly and at a proportionate cost. Justice was best served by maintaining the trial date if at all possible and ensuring that AXA had sufficient disclosure to understand the original expert's views. As a result, if the consequence of a replacement structural engineering expert had been to lose the trial date, then for that reason alone, the judge would not have granted permission.

The judge did decide to give permission for the replacement expert. The reasons included that:

- It was not disputed that structural engineering evidence was central to the issues in this case. Without it, the claimants would likely be at a very significant and possibly insurmountable disadvantage.
- The expert evidence could be timetabled in a way which preserved the trial date and did not cause unfairness to AXA.
- The limited evidence available did not support a conclusion that there was an attempt to change the opinion of the first expert on the central issues in dispute. This was not a case of *"expert shopping"*.

- The conduct complained about was not that of the claimants but their solicitors, and there had been a full and frank admission and an apology to the court and AXA.

The decision to change the expert was made to provide a fair and swift resolution of any concerns of non-compliance and the independence of the expert. Further, the extent of disclosure given, in addition to the first expert's report, met the concern to ensure that full information is available to AXA.

## Adjudication: payment schedules

### *Morganstone Ltd v Birkemp Ltd* [2024] EWHC 933 (TCC)

On 23 February 2024, an adjudicator decided that £207k was due to Birkemp following their interim payment application dated 31 August 2023. On 4 March 2024, Morganstone issued a Part 8 claim seeking a declaration that Birkemp had no contractual right to make the August application or any interim payment application after March 2023 and that, inasmuch as the adjudicator's decision determined that Birkemp was entitled to make or be paid for the August application, the decision was wrong in law and unenforceable. The next day, Birkemp issued an application seeking summary enforcement of the decision.

The parties had agreed a monthly payment schedule which was updated in 2022. The updated schedule was the same as that of the original. The due date was the 14th day of the month. The date for the payment notice was the 19th day of the month, subject to the adjustment where that was a Saturday or a Sunday. The final date for payment in each month was the second Friday of the month, and the date for the pay less notice was the Wednesday two days before.

On 24 March 2023, shortly before the final date in the 2022 payment schedule, Morganstone sent to Birkemp by email a further monthly payment schedule running for an additional twelve months. There was one difference from the previous schedules, in that the final date for payment in each month was the third, not the second, Friday.

On 30 March 2023, Birkemp complained that the 2023 payment schedule was incorrect as the specified dates for pay

less notices and for payments were one week late. Birkemp asked that the schedule be amended and reissued. Morganstone maintained that the dates were correct.

The parties never reached an agreement. Birkemp made payment applications in accordance with the 2023 payment schedule, as it took no issue with the due date in that document, but Morganstone consistently issued pay less notices by reference to the dates in the 2023 payment schedule. It was accepted that Birkemp never agreed to be bound by the 2023 payment schedule and that Morganstone never agreed to revise it so as to make the final date for payment the second Friday in each month.

On 8 September 2023, Morganstone issued a pay less notice against the August application, making a number of deductions. However, it did so expressly without prejudice to its primary position that Birkemp had no entitlement to apply for any interim payments essentially because the 2023 payment schedule had not been agreed. Birkemp contested many of the deductions which led to the dispute referred to adjudication.

Morganstone relied on the CA case of *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*, (see [Dispatch, Issue 197](#)). Grove had asserted that Balfour Beatty had no entitlement to receive interim payments beyond the final date in the payment schedule. The CA, by a majority, agreed. Jackson LJ held that there was no *"fresh"* contract for monthly interim payments after the payment schedule expired. The parties had never agreed the terms upon which interim payments would be made.

Morganstone said that the parties agreed to the 2022 payment schedule, which therefore had contractual effect. But the parties never agreed a payment schedule for the period after March 2023; therefore, as shown by *Balfour Beatty*, there was no ongoing right to interim payments. Any lack of *"commercial common-sense"* in the resulting position was simply the consequence of Birkemp failing to make an agreement.

Birkemp relied on an express provision in the contract for interim monthly payments during the progress of the subcontract works. In *Grove*, the parties were bound by the terms of their agreement. Here, unlike in *Grove*, the parties could fall back on the contract.

HJJ Keyser agreed with Birkemp. Grove was a case that turned on the precise terms of the parties' agreement. The parties there may have envisaged and intended that further interim payments would be made but they had not actually reached agreement on essential matters. The case did not establish any significant wider propositions of law. Here, the parties doubtlessly envisaged and intended that payment schedules would continue to be agreed for all periods during the currency of the development. However, they failed to agree a schedule for the period after March 2023. The question then became whether or not they had any applicable contractual agreement for that period. Morganstone said that they had not. The judge disagreed.

Once any further agreed schedule ended, there was nothing to displace the original contractual timetable. If the parties did not mutually adopt a new payment schedule, the original timetable in clause 10 would be operative, because there would be nothing to which it would cede precedence. Therefore, the Part 8 claim failed.

However, when it came to the summary enforcement, the judge noted that the adjudicator did not address the substance of the cross-claims raised by Morganstone, because the adjudicator had made the preliminary decision that their consideration fell outside the scope of their jurisdiction.

The judge noted that Birkemp was not merely seeking a ruling on the appropriate of specific deductions in the pay less notice. It was seeking, and it obtained, an award of payment. Birkemp's manner of drafting the notice of adjudication and its subsequent reliance on the confines of that drafting clearly sought to "put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim" – that is, the claim for payment. Further:

*"Birkemp's tactic amounted to the use of a fallacious argument that, once the validity of the deductions in the pay less notice had been determined, it was entitled to payment of the resulting amount".*

Morganstone was not seeking to widen the scope of the adjudication by raising other, freestanding disputes. It was engaging with and responding to the issues in the adjudication by raising

cross-claims as a defence of set-off to Birkemp's claim for payment. As Lord Briggs JSC stated in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25:

*"However narrowly the referring party chooses to confine the reference, a claim submitted to adjudication will nonetheless confer jurisdiction to determine everything which may be advanced against it by way of defence, and this will necessarily include every cross-claim which amounts to (or is pleaded as) a set-off."*

Therefore, here, the adjudicator took an erroneously restrictive view of their jurisdiction. As a result, the adjudicator's failure was deliberate rather than inadvertent, in that they specifically addressed their mind to the question whether the cross-claims could be raised on the adjudication and decided that cross-claims could not be raised as they fell outside the scope of the adjudication. The error was material, in that they would, if upheld, have had a very significant effect on the overall result of the adjudication. Moreover, the error was brought about by Birkemp's deliberate attempt to achieve a tactical advantage by confining the scope of the adjudication in such a manner as to exclude potentially relevant defences to the claim for payment. The adjudicator's decision was, therefore, unenforceable.

### Adjudication enforcement: costs

#### *ATG Services (Scotland) Ltd v Ogilvie Construction Ltd* [2024] CSOH 94

Ogilvie refused to pay an adjudicator's decision of £1 million claiming that there had been breaches of natural justice. ATG had been appointed a sub-contractor for a groundworks package at a project for the construction of a housing and care facility. The dispute arose in connection with an interim payment application made by ATG. The adjudicator decided that ATG had made a valid application for payment, that there was no valid payment notice and that no valid pay less notice had been issued by Ogilvie, and that the final date for payment had passed without full and proper payment of the notified sum.

Ogilvie said that the sub-contract required notices served under it to be sent by first class recorded delivery post to a stipulated address or to such further address as might

be notified in writing from time to time, or else by fax. It was further agreed at a pre-contract meeting that any applications for payment had to be submitted to two specified email addresses. The application in question took the form of an attachment to an email sent to a different email address, albeit one that was associated with Ogilvie.

Ogilvie did not seek to argue that it had not duly received the email. Rather, it maintained that the use of a method of service other than that stipulated in the contract rendered what was sent invalid as an application for payment of a notified sum. ATG said that the parties had adopted a course of conduct which treated applications served other than in accordance with the provisions of the contract as nonetheless valid.

Lord Sandison held that Ogilvie's defence was: "entirely without merit" noting that:

*"To describe an adjudicator as having gone off on a frolic of his own is to maintain that his decision depends to some material extent on a ground which was not suggested to him by the parties and on which he gave them no sufficient opportunity to comment. It is that lack of opportunity to state one's case which permits the categorisation of such a frolic as a breach of the requirements of natural justice."*

Here, both parties accepted that a live question in the adjudication was whether the Ogilvie's behaviour in having accepted and dealt with earlier payment applications from ATG which had not been made by the means prescribed by the contract meant that it was no longer entitled to insist on the contract requirements. The legal principle being asserted by ATG was entirely clear. It was open to Ogilvie to submit whatever it chose in response. Instead, Lord Sandison said that Ogilvie: "contented itself with the somewhat delphic pronouncement that ATG had failed to evidence any principle of Scots law upon which it is seeking to rely in relation to its submissions on course of conduct", adding later that ATG had "failed to provide a Scots law principle or any authority for their assertions".

The judge said that the adjudicator was perfectly entitled to prefer ATG's submissions, and even if the adjudicator was wrong in their determination of the law, that would represent no more than an error of law, about which Ogilvie could have no relevant complaint in the context of an adjudication enforcement.

Lord Sandison reminded Ogilvie that: "It may be tempting to forget from time to

time that it is no part of the function of this court to act as a general appeal tribunal in respect of the adjudicator's decision, but it must not be lost sight of that the criticism of the adjudicator in this connection is that he breached the requirements of natural justice by going off on a frolic of his own". The suggestion here was: "nothing less than an inversion of reality. No opportunity for injustice to be done was afforded".

Lord Sandison concluded that the legislative policy of "pay now, argue later" that lay behind the relevant sections of the HGCRA judicial policy ought to be to discourage, as far as properly possible, frivolous defences such as those advanced here. This "unreasonable behaviour" justified an award of expenses on "the agent and client, client paying scale", which is effectively the Scottish equivalent of indemnity costs.

### Had the adjudicator addressed all the defences raised and were the declarations "meaningless and thus unenforceable"?

*UK Grid Solutions Ltd & Anr v Scottish Hydro Electric Transmission plc*  
[2024] ScotCS CSOH\_5

The pursuers, a joint venture, entered into a contract with Scottish Hydro, the defender, in respect of works to be carried out at an existing electricity substation on the outskirts of Fort Augustus. The contract was based on NEC3 Option A.

The delivery and installation of the two transformers was delayed, which gave rise to a compensation event ("CE"). The project manager made an assessment that the CE had no effect upon the defined cost, completion or meeting a key date, and the JV gave notice of adjudication, seeking an order for payment of the sum due in respect of the alleged increased defined cost. The JV asked that the adjudicator provide reasons for their decision.

The adjudicator's decision included:

"12.13. I declare that the Contractor is entitled to an increase in the Defined Costs (including Fee) in the sum of £1,834,573.43.

12.14. I order for payment of £1,834,573.43, or such other sum as the Adjudicator may decide, within 7 days of the Adjudicator's.

12.15. I declare that the Contractor is entitled to interest on the sum noted at paragraph 12.14 ...

12.16. I order for payment of the interest noted in paragraph 12.15 above, within 7 days of the Adjudicator's decision."

The defender refused to comply with the decision saying that:

- i. The adjudicator had failed to exhaust their jurisdiction by failing to address certain relevant and material defences advanced by the defender relating to delay damages and deductions or set-off.
- ii. Contrary to that, if the adjudicator did, in fact, address and reject the defender's argument, they gave no reasons for doing so.
- iii. The adjudicator's purported financial award was meaningless and unenforceable.

The defender said that, where required to give reasons, an adjudicator was obliged to make clear that they had decided all essential issues properly put forward by the parties. The parties should be able to understand from the adjudicator's reasons: "in the context of the adjudication procedure, what it was that the adjudicator had decided and why".

In the adjudication, the defender denied that the JV were entitled to any extension of time. The JV was in critical and culpable delay caused by the pursuers' lack of progress, poor coordination, and defects in their works. Accordingly, the defender was entitled to recover liquidated damages which they were entitled to deduct/set off against any sums otherwise due to the JV.

The adjudicator had not "referred to, let alone determined" these arguments. As such, the adjudicator had failed to address a material line of defence advanced by the defender. Although the adjudicator, in their decision, noted that they agreed with the contractor saying that if the compensation event had been assessed in accordance with the contract, payments would have been made accordingly, this did not address the defender's arguments in respect of liquidated damages and set-off.

Further, paragraph 12.14 of the decision was "meaningless and thus unenforceable". This paragraph did not order the defender to make payment of a specified sum. Nor did it specify the time period within which any such payment was to be made. The NEC3 contractual conditions contain a mechanism whereby the adjudicator could correct clerical errors within 14 days of the decision. No correction had been made. It was not for

the court to try to correct the adjudicator's error at this stage. To act in this way would usurp the role of the adjudicator.

Lord Richardson repeated the well-known approach of the courts to summary enforcement. The court will only interfere in the plainest of cases, it is "chary" (i.e., cautiously reluctant) of technical defences, and if the adjudicator has answered the right questions, the decision will be binding even if it is wrong in fact or law.

There was no dispute between the parties that where an adjudicator has failed to address and determine a material line of defence, this will result in unfairness and a breach of natural justice which will mean that the court will not enforce the adjudicator's decision. Lord Richardson was satisfied that the defence of set-off had been put before the adjudicator. It was also a material line of defence that could not be ignored by the adjudicator.

However, the judge was satisfied that the adjudicator did address and determine this line of defence. The adjudicator referred to the arguments advanced by the defender in the Rejoinder submission in respect of the redress by the pursuers. It was "reasonably clear" that the adjudicator had concluded, in agreement with the JV's arguments, that they ought to have been paid by the defender following the assessment of the compensation events in accordance with the parties' contract. Had this been done, the payment by the defenders would have pre-dated the defender's claims for liquidated damages. On this basis, had the contract been complied with, the defender's arguments, including set-off, based on its entitlements for liquidated damages could not have been advanced at the time payment ought to have been made by the defender.

Lord Richardson said that it was clear it was not necessary for an adjudicator to deal in their decision expressly with every argument made to them. That is, provided that the adjudicator deals with the arguments which are necessary and sufficient to establish the route by which they reached their decision. Here, it was: "possible to discern from the adjudicator's decision, reasonably construed against the background of the submissions made ... both what [the adjudicator] decided and the reasons for that decision".

Lord Richardson agreed that it was clear that both paragraphs 12.14 and 12.15 of the adjudicator's decision contained errors. However, he did not consider that

any "reasonably informed reader" of the decision would have any doubt that the adjudicator intended to order payment by the defender to the pursuers of the sum of £1,834,573.43. That is the sum which the adjudicator had declared the JV were entitled to as an increase in the defined costs (including fee). The judge further had no doubt that the same reasonably informed reader would have understood that payment of that sum was to be made, along with the interest awarded in paragraph 12.15 of the decision, within seven days of the decision.

### Conditions Precedent

#### *Tata Consultancy Services Ltd v Disclosure and Barring Service* [2024] EWHC 1185 (TCC)

In part of a lengthy decision about an IT modernisation project, both parties suggested that to recover either compensation for delays or delay damages, the other party had to comply with certain conditions precedent. Having reviewed a number of authorities, Mr Justice Constable, whilst stressing that the overriding principle was that every contract must be construed according to its own particular terms, set out a list of the relevant matters that need to be considered when considering whether or not a clause is a condition precedent:

- "(2) *there is nothing as a matter of principle which prevents parties freely agreeing that the exercise of a particular right to payment or relief is dependent on compliance with a stated procedure, but parties will not be taken to have done so without having expressed that intention clearly;*
- (3) *the language of obligation in relation to procedure to be complied with (e.g. 'shall') is necessary, but not sufficient;*
- (4) *the absence of the phrase 'condition precedent' or an explicit warning as to the consequence of non-compliance is not determinative against construing the regime as one of condition precedent;*
- (5) *however, the absence of any language which expresses a clear intention that the right in question is conditional upon compliance with a particular requirement is likely to be,*

*at the very least, a powerful indicator that the parties did not intend the clause to operate as a condition precedent;*

- (6) *the requisite 'conditionality' may be achieved in a number of different ways using different words and phrases when construed in their ordinary and natural meaning;*
- (7) *the clearer the articulation, purpose and feasibility of the requirement to be complied with (in terms of substance and/or timing), the more consistent it will be with the conclusion that, depending on the rest of the language used, the requirement forms part of a condition precedent regime."*

Here, Clause 5.6 provided in "plain language" that DBS "shall not be liable to compensate [TCS] for Delays to which Clauses 7 or 8 apply unless [TCS] has fulfilled its obligations set out in, and in accordance with, Clauses 5.1, 5.2 and 5.3". This wording had the effect of making compliance with Clauses 5.1 to 5.3 a condition precedent to any entitlement to compensation under Clauses 7 or 8.

However, this condition precedent regime applied only to DBS's liability to compensate TCS for "Delays", a defined term. This meant that a failure to comply with the condition precedent would not impact upon TCS's entitlement to relief as described in other clauses, here the "authority" clause. As a result, non-compliance would not prevent TCS from defending itself from DBS's claims, whether for Delay Payments or for damages for breach of contract provided it established that the failure to achieve a completion date was the result of such an "authority" clause.

This left the question of whether TCS's own claims for damages, as opposed to contractual compensation, would be caught by Clause 5.6. DBS argued that the objective intention of the parties cannot have been that (having expressly agreed that the payment of delay compensation in certain circumstances was subject to a condition precedent) TCS could circumvent that regime by claiming damages for breaches of other terms of the Agreement.

The judge agreed. TCS's potential entitlement to claim both loss and expense pursuant to Clause 7.4 and general damages at common law for

Delays (as defined) were subject to compliance with the regime at Clauses 5.1 to 5.3. The ordinary meaning of the language used in Clause 5.6 (*"liable to compensate [TCS] for Delays"*) was wide enough to cover both claims brought under, and for, breach of contract. Finally, the judge noted that:

*"the purpose of a notice regime is to give an employer the opportunity to engage in the mitigation of delay, particularly delay which it knows is going to be claimed has been caused by a matter for which the employer is to blame. In this context, a construction which requires a contractor to notify the employer only for the purposes of a contractual right to compensation, but allows the same claim on the same facts to be advanced at common law without having given notice is uncommercial. It also runs contrary to the risk and reward allocation set out expressly."*

When it came to delay damages, where a milestone was not achieved due to issues with testing, by Sub-clause 6.1, DBS was required (*"shall"*) to *"promptly issue a Non-conformance Report"*. Clause 6.1 concluded, *"The AUTHORITY will then have the options set out in Clause 6.2"*. No non-conformance reports were issued.

The judge considered that, when looking at ordinary language of the clause, the word *"then"* in the last sentence of Clause 6.1 made clear, at the very least, that the entitlements in Clause 6.2 happened after the matters dealt with in the preceding words of Clause 6.1 had been engaged. The entitlements in Clause 6.2 were clearly linked to Clause 6.1, through the conditional phrasing of *"If ... then ..."* The judge noted that:

*"the rationale for the imposition of a notice regime as a condition precedent is to know where a party stands contemporaneously, and to allow the defaulting party to rectify its default."*

Further, the use of the word *"promptly"*, rather than a specified number of days, did not preclude the condition-precedent nature of compliance. Whether a report had been given *"promptly"* was a question of fact and is sufficiently certain in meaning to be given effect to.

That, however, was not the end of the story. Clause 5.2 required TCS to submit a draft Exception Report to TCS: *"not later than five (5) Working Days ... after*

*the initial notification"*. TCS said that it had assumed that DBS would not rely on Clauses 5.1 to 5.3 as a condition precedent. The judge agreed with that for a number of reasons, including:

- DBS did not, in discussions and negotiations: *"articulate any reliance upon the provisions at the time"*. The: *"condition precedent was simply not a live point"*.
- There was an assumption by TCS that, whilst it was still necessary to produce an Exception Report, no technical point on 5 Working Days was being taken against it and that any entitlement would be determined in light of the substantive merits.
- DBS did not take any point that TCS were not entitled to bring a claim because no Exception Report had been served within 5 Working Days. One witness gave evidence that the first time they could remember seeing the 5 Working Days point being taken by DBS was in the pleadings.

This was not a case of acquiescence by nothing more than silence. DBS had not reserved their position. It was clear, on DBS's own evidence, that it also considered that the 5 Working Day requirement had *"fallen by the wayside"*. It would have been obvious to DBS that TCS was engaging in the project in a way, to DBS's benefit, that it may not have done faced with a denial of entitlement to compensation based on the 5 Working Day point.

As a result, DBS was now estopped from arguing that TCS had no entitlement to compensation for delay on account of its failure to comply with Clause 5.3. ■

## Other cases: Construction Industry Law Letter

**Housing Grants, Construction and Regeneration Act, section 104 – Whether a collateral warranty is a construction contract – Meaning of “for ... the carrying out of construction operations”**

**Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP (formerly Simply Construct (UK) LLP)**

[2024] UKSC 23

*Supreme Court;  
Before Lord Briggs, Lord Hamblen, Lady Rose, Lord Richards and Lady Simler;  
Judgment delivered 9 July 2024*

### The facts

By a contract dated 29 June 2015 in the JCT Design and Build 2011 edition form (the “Building Contract”), August 2008 LLP (formerly Simply Construct (UK) LLP) (“Simply”) was engaged by Sapphire Building Services Ltd (“Sapphire”) to design and build a 65-bedroom care home in Mill Hill, London (the “Property”).

Simply commenced work in early 2015 and the works were certified as practically complete in October 2016. In June 2017, Sapphire and Simply entered into a settlement agreement, by which they settled the final account and all claims under the Building Contract, save for latent defects. Sapphire then novated the Building Contract to a company called Toppan Holdings Ltd (“Toppan”) which was the owner of the Property.

On 12 August 2017, Toppan granted a 21-year lease of the Property to Abbey Healthcare (Mill Hill) Ltd (“Abbey”). In August 2018, Toppan discovered alleged fire safety defects at the Property. Simply was asked to rectify the defects and did not do so. Toppan therefore engaged a third-party contractor to carry out remedial works. The remedial works commenced on or around 25 September 2019 and were practically complete by 14 February 2020. Abbey alleged that it paid for the remedial works on behalf of Toppan.

In late 2020, Simply entered into a collateral warranty with Abbey (the “Abbey Collateral Warranty”). The Abbey Collateral Warranty was in fairly standard terms and included warranties as to the sufficiency of the work carried out or to be carried out by Simply.

Toppan and Abbey made claims against Simply arising out of fire safety defects

that arose in the Property. Simply refused the request that the disputes be dealt with in a single adjudication. On 11 December 2020, Toppan and Abbey each referred to adjudication a dispute regarding the alleged defects claiming approximately £8.8 million and £5.5 million, respectively. The same adjudicator was appointed in both adjudications.

The relevant provisions of the Housing Grants, Construction and Regeneration Act 1996 (the “1996 Act”) only apply to “construction contracts” which under section 104(1) of the 1996 Act are defined as an agreement for the carrying out of “construction operations”. Construction operations are further defined in section 105 of the 1996 Act and include the construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings.

In the Abbey adjudication, Simply challenged the jurisdiction of the adjudicator on the grounds that the collateral warranty given to Abbey by Simply was not a construction contract for the purposes of the 1996 Act. By a non-binding ruling given on 26 February 2021, the adjudicator rejected Simply’s challenge. The Abbey adjudication proceedings therefore continued with Simply reserving its rights in this regard.

On 30 April 2021, the adjudicator issued a decision in each of the adjudication findings for Toppan and Abbey on liability, awarding Toppan approximately £1 million and awarding Abbey damages of £869,500. Simply did not pay the amounts awarded. On 12 May 2021, Toppan and Abbey issued enforcement proceedings.

By a judgment dated 27 July 2021 ([2021] BLR 705), the judge at first instance granted summary judgment for Toppan but dismissed Abbey’s application on the basis that the Abbey Collateral Warranty was not a construction contract within the meaning of section 104 of the 1996 Act.

The judge held that the Abbey Collateral Warranty should be construed against the background that at the time of its execution, works had been completed four years previously and remedial works had been completed eight months previously and neither Abbey nor Simply contemplated the possibility of further construction operations being carried out. The judge concluded that, so construed, the Abbey Collateral Warranty was not a construction contract for the carrying out of construction operations but instead a

warranty as to events which had occurred years before. Abbey appealed.

On 21 June 2022, the Court of Appeal handed down judgment ([2022] BLR 433) allowing the appeal by a majority (Peter Jackson and Coulson LJ; Stuart-Smith LJ dissenting). Whilst all members of the Court of Appeal considered that a collateral warranty could be a construction contract, they differed as to whether the Abbey Collateral Warranty was a construction contract. Coulson LJ stated that what was critical in determining whether a collateral warranty was a construction contract was whether the warranty was in respect of the ongoing carrying out of construction operations or whether it was in respect of a "past and static" state of affairs. As the Abbey Collateral Warranty referred to Simply having performed and continuing to perform its obligations under the Building Contract, Coulson LJ considered this to be a warranty of both past and future performance and concluded that the Abbey Collateral Warranty was a construction contract for the purposes of the 1996 Act. Peter Jackson LJ adopted similar reasoning and both judges relied on the decision of Akenhead J in *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] BLR 589, in which the court had determined that a collateral warranty could be a construction contract under the 1996 Act.

Stuart-Smith LJ, dissenting, placed reliance on the wording of section 104 that the contract must be "for" the carrying out of construction operations. Stuart-Smith LJ considered that this carried with it the implication that a party to a contract for the carrying out of construction operations undertakes a direct contractual obligation to the other party to carry out those operations and it is not sufficient for the contractor to merely warrant its performance of obligations owed to someone else. Applying that reasoning to the Abbey Collateral Warranty, Stuart-Smith LJ concluded that the Abbey Collateral Warranty warranted Simply's performance of obligations owed to the Employer (Sapphire/Toppan) and did not establish a direct obligation to carry out construction operations. Accordingly, the Abbey Collateral Warranty was not a construction contract.

Simply appealed to the Supreme Court, relying on the reasoning of the dissenting judgment in the Court of Appeal.

### Issues and findings

*Was the Abbey Collateral Warranty a construction contract within the meaning of section 104 of the 1996 Act?*

No. Section 104(1) of the 1996 Act refers to a construction contract being "for" the carrying out of construction operations not "in respect of" the carrying out of such operations. Accordingly, a collateral warranty will not be an agreement for the carrying out of construction operations if it merely promises to perform obligations owed to someone else under the building contract. Instead, there needs to be a separate or distinct obligation to carry out construction operations for the beneficiary. Here, there was no such separate and distinct obligation in the Abbey Collateral Warranty.

As a result of this decision, the Supreme Court also formally overruled the decision in *Parkwood*.

### Commentary

As noted in the judgment, there are many commentators who consider that *Parkwood* was wrongly decided. This judgment overrules that case and reverses the decision of the Court of Appeal in this case.

The Supreme Court did accept that a collateral warranty could be a construction contract but also recognised that its interpretation of section 104(1) of the Act meant that it is likely that most collateral warranties will not be construction contracts for the purposes of the 1996 Act.

The Supreme Court also considered that there were good reasons for concluding that, in general, collateral warranties were not intended to fall within the scope of the 1996 Act. These reasons included that the payment related provisions at sections 109–113 of the 1996 Act are generally inapplicable to collateral warranties meaning that one of the twin purposes of the 1996 Act, cashflow, was not furthered by its application to collateral warranties. As for the second purpose of the 1996 Act, adjudication, it is right to say (as the Supreme Court noted) that this can be provided for within the collateral warranty agreement in any event, on a voluntary basis.

This is an important judgment, but it is also worthwhile noting that it does not impact the substantive rights of a beneficiary under a collateral warranty.

Subject to any issues of limitation, it would presumably still be open to Abbey to bring either court or arbitration proceedings against Simply to recover the monies that it says it spent on remedial works and, from a project documentation point of view going forward, collateral warranties can be drafted to reflect the provision of adjudication for disputes. It is unlikely that a contracting party would be in a position not to agree to such a remedy being included in a collateral warranty, particularly if it is at the behest of funders.

### Arbitration Act 1996, section 68 – Setting aside arbitration award – Corruption and bribery – Arbitration practice

#### *The Federal Republic of Nigeria v Process & Industrial Developments Ltd*

[2023] EWHC 2638 (Comm)

*In the Commercial Court; Before Mr Justice Robin Knowles CBE; Judgment delivered 23 October 2023*

### The facts

On 11 January 2010, the Federal Government of Nigeria ("Nigeria") entered into a Gas Supply and Processing Agreement for Accelerated Gas Development (the "GSPA") with Process & Industrial Developments Ltd ("P&ID").

The background to the GSPA was that, historically, Nigeria had a chronic shortage of power with gas from the recovery of oil in Nigeria being flared rather than used to generate electricity, which in turn caused harmful pollution. The GSPA was part of a policy named the Accelerated Gas Development Project to tackle this.

Under the GSPA, Nigeria was to supply specified quantities of "wet" gas to gas-processing facilities ("GPFs") constructed by P&ID. P&ID was to strip the wet gas into "lean" gas, to be delivered to Nigeria for power generation.

The remaining natural gas liquids were to be retained by P&ID for onward sale either domestically or by export. The stated duration of the GSPA was a minimum of 20 years. The GSPA was very brief and high level. However, it contained an obligation on Nigeria to supply the wet gas regardless of whether or not P&ID constructed any GPFs.

Nigeria did not supply any wet gas to P&ID and P&ID did not construct any GPFs.

In the third year of the GSPA, P&ID commenced an arbitration (the "Arbitration") against Nigeria. By a part final award (the "Award on Liability") dated 17 July 2015, the tribunal found: that Nigeria had committed a repudiatory breach of the GSPA; that the GSPA was terminated on P&ID accepting that repudiatory breach and that Nigeria was liable in damages.

By a further award (the "Final Award") dated 31 January 2017, the tribunal ruled on quantum and ordered Nigeria to pay P&ID US\$6.6 billion together with interest at the rate of 7%. This was a sum so vast that it was material to Nigeria's entire federal budget. As of 2023, with interest, the amount exceeded US\$11 billion.

Nigeria commenced proceedings in the Commercial Court in London challenging the Award on Liability and the Final Award (the "Awards") under section 68 of the Arbitration Act 1996 (the "1996 Act") on the basis of serious irregularity causing substantial injustice, in that the Awards had been obtained by fraud or the Awards or the way in which they had been procured were contrary to public policy. Nigeria argued that there had been bribery, corruption and perjury, both in relation to the GSPA and the arbitral process. Nigeria's allegations included that:

- A relevant Ministry lawyer, Ms Taiga, who had been involved in the drafting of the terms of the GSPA, had been paid bribes in relation to the entry into of the GSPA and to help P&ID obtain favourable terms. Ms Taiga retired from the Ministry in 2021, but when the arbitration was commenced by P&ID, she was identified as P&ID's "legal adviser".
- During the course of the arbitration, P&ID was provided with many of Nigeria's privileged internal legal documents, which Nigeria claimed were procured by corruption of Nigeria's legal advisers carried out by P&ID. Such corruption was also alleged in relation to the conduct of the arbitration and arguments which were (or were not) submitted to the tribunal in Nigeria's defence.
- P&ID's legal representatives in the arbitration, Mr Seamus Andrew of initially Marcus Sinclair LLP and then SC Andrew LLP and Mr Trevor Buke

KC (who was the nephew of one of the key members of P&ID) had very significant personal interest in the matter with claims for payment of up to £3 billion and £850 million, respectively, contingent on success for P&ID.

- Both Mr Andrew and Mr Burke KC were aware that Nigeria's internal legal documents had been provided to P&ID but did not put a stop to that by informing Nigeria or immediately returning the documents they knew they had received. Nigeria alleged that this was because of the money that Mr Andrew and Mr Burke stood to make if the action was successful.
- P&ID's chief witness, Mr Michael Quinn, had omitted to set out in his witness statement, when explaining the circumstances in which the GSPA came about, the true nature of those circumstances, including the payment of bribes, and that this was dishonest. He had also falsely represented that project finance was in place for P&ID for the project and that 90 per cent of the engineering designs had been completed.

P&ID argued, amongst other things, that any perjury that did take place did not cause substantial injustice under section 68 of the 1996 Act as it did not bring about the Awards (or any of them).

#### Issues and findings

*Had there been bribery and corruption such that the Awards should be set aside pursuant to section 68 of the 1996 Act?*

Yes. Further, substantial injustice had occurred. The Awards were the result of the Arbitration that happened and the Arbitration would have been completely different and strongly favourable to Nigeria if the fraud had not occurred. In making these findings the court also called upon the arbitration community to debate and reflect and consider whether the arbitration process needs further attention where the value involved is so large and where a state is involved.

#### Commentary

This very lengthy judgment is important reading for all arbitration practitioners. As the judge noted, what happened in this case was very serious and the outcome could very easily have been different had the witness statement of Mr Quinn been drafted a little more carefully

and had P&ID not retained the privileged legal documents that it had obtained during the arbitration.

The judge ended his judgment calling on the arbitration community to debate and reflect on the arbitration process and whether that process needs further attention where the value involved is so large and where a state is involved.

Court intervention in the arbitration process is rare and it is clear that the gravity of this case (with the judge also stating that he would be referring Mr Andrew and Mr Burke KC to their respective regulators) led the judge to make these observations.

### SBC and JCT Standard Forms of Contract – CI 4.20 of SBC – Whether notice condition precedent to loss and expense entitlement

#### *FES Ltd v HFD Construction Group Ltd*

[2024] CSOH 20

*Scottish Court of Session, Outer House; Before Lord Richardson; Judgment delivered 27 February 2024*

#### The facts

By a contract dated 25 and 28 February 2020, HFD Construction Group Ltd ("HFD") engaged FES Ltd ("FES") to carry out certain fit out and related works in relation to an office building in Glasgow. The contract was in the form of the Standard Building Contract with Quantities for use in Scotland, 2016 Edition, which is the equivalent of the English JCT form. The contract also contained bespoke amendments.

During the course of the works, FES encountered various delays including in relation to the closure of the site during the COVID-19 pandemic. A dispute subsequently arose between the parties as to FES's entitlement to an extension of time and associated loss and expense.

In October 2022, FES referred the dispute to adjudication. On 10 March 2023, the adjudicator issued his decision. Amongst the issues identified was whether giving notice under clause 4.21 of the contract was a condition precedent to the recovery of loss and expense and the adjudicator found that such notice was a condition precedent. The adjudicator

went on to find that FES had not given the required notice.

FES commenced proceedings on the meaning of clause 4.21 of the contract.

#### Issues and findings

*Was notice under clause 4.21 of the contract a condition precedent to recovery of loss and expense?*

Yes.

#### Commentary

Whilst this is a Scottish case relating to the SBC form of contract, it is of direct relevance to the English JCT suite of contracts as the clause in question also appears in that suite.

In this case, the judge robustly rejected the request for a declaration that the giving of notice is not a condition precedent to entitlement to loss and expense. In doing so, the judge considered the case law in relation to previous JCT forms with similar wording and his judgment is consistent with those cases.

A point made in passing at the end of the judgment is of interest. The parties had agreed a bespoke amendment to the contract which excluded FES's common law rights in relation to claims made in respect of loss and expense. Typically claims for loss and expense are made under the relevant contract provisions and in the alternative as damages at common law. Whilst not absolutely clear, the judge appears to indicate that had that common law right been maintained then the lack of notice would not have led to an overall loss of entitlement as the claim could have been made at common law. In other words, the condition precedent only relates to the contractual mechanism and not the common law right.

#### Case law falsely generated by AI

##### ***Harber v Commissioners for His Majesty's Revenue and Customs***

[2023] UKFTT 1007 (TC)

*In the First-Tier Tribunal (Tax Chamber);  
Before Tribunal Judge Anne Redston and  
Ms Helen Myerscough;  
Judgment delivered 4 December 2023*

#### The facts

Mrs Harber disposed of a property and failed to notify her liability to Capital Gains Tax ("CGT") to HMRC. In turn, HMRC issued a "failure to notify" penalty of £3,265.11.

Mrs Harber appealed the penalty on the basis that she had a reasonable excuse, namely that she had a mental health condition at the relevant time and it was reasonable for her to be ignorant of the law.

The matter was listed to be heard by the First-Tier Tribunal ("FTT"). In advance of the hearing, Mrs Harber issued a Response document which included names, dates and summaries of nine FTT decisions in which the appellant had been successful in showing that a reasonable excuse existed on the grounds that Mrs Harber was arguing.

Following consideration of the Response by HMRC and the tribunal, doubt was cast on the validity of the authorities cited and Mrs Harber was asked whether they had been generated by an artificial intelligence (AI) system such as ChatGPT. Mrs Harber stated that this was possible. The tribunal went on to consider whether, as a matter of fact, the authorities were AI-generated, whether or not Mrs Harber knew this and the approach that should be taken to the authorities if they had been AI generated.

#### Issues and findings

*Were the authorities AI-generated?*

Taking into account a number of factors in relation to the authorities, the tribunal found that as a matter of fact the authorities were not genuine FTT judgments but had been generated by an AI system such as ChatGPT.

*What was the correct approach to the use of AI generated authorities?*

The tribunal found that Mrs Harber was not aware that the authorities had been AI-generated but that regardless of knowledge, the citing of invented

judgments causes harm as it leads to the waste of public time and money and promotes cynicism about judicial precedents.

### Commentary

Whilst not a construction case, this judgment is of interest to practitioners given the issue of the use of AI in the submissions made by Mrs Harber. The use of AI in legal practice is increasing and there are many forms in which it can be used to aid and assist practitioners.

However, this case and others like it illustrate the danger of using AI tools without checking the validity of the content that is being generated. The issue is serious. As noted by the FTT, the use of precedent is a cornerstone of our legal system and therefore the use of false authority will only serve to undermine that system.

It would be easy to distinguish this case on the basis that the party using the AI generated authorities was a litigant in person. However, it is clear from the examples drawn upon by the tribunal from the US that lawyers can equally be drawn into making the same mistake. Notwithstanding, it is not difficult to see that this type of issue may be more prevalent in areas of the law where there is more self representation, such as family law or lower value disputes, placing a further burden on an already stretched system.

## Section 123 of the Building Safety Act 2022 – Regulation 2(2) of the Building Safety (Leaseholder Protection) (Information etc) (England) Regulations 2022 – Whether Remediation Order should be granted when works had commenced under a building contract and funding had been granted

**Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership**

(CAM/26UK/HYI/2022/004)

*First-Tier Tribunal (Property Chamber); Before Mr Justice Wayte and Mr Justice David Wyatt; Judgment delivered 29 April 2024*

### The facts

As a result of the Grenfell Tower disaster, the Building Safety Act 2022 (the "2022 Act") and the Building Safety (Leaseholder Protection) (Information etc) (England) Regulations 2022 (the "2022 Regulations") were enacted.

Section 123 of the 2022 Act and reg 2(2) of the 2022 Regulations empowers the Property Chamber of the First-Tier Tribunal ("FTT") to make a Remediation Order ("RO") requiring a relevant landlord to remedy specified "relevant defects" in a "relevant building" by a specified time.

The purpose of such orders reflects the Building Safety regime adopted in the wake of the Grenfell Tower disaster to ensure that the residents of buildings are not left bearing the cost of the remediation work required to their buildings.

For the purposes of the 2022 Act and 2022 Regulations:

- A "relevant building" means a self-contained building or self-contained part of a building in England that contains at least two dwellings and is at least 11 mt high or has at least five storeys;
- "Relevant defect" is widely defined by reference to anything that arises following relevant works in the preceding 30 years and causes a building safety risk;
- "Relevant works" is widely defined and includes construction and conversion works; and

- "Building safety risk" means a risk to the safety of people in or about the building arising from the spread of fire or the collapse of the building or any part of it.

Applications for ROs may be made by an interested person which includes any person with a legal or equitable interest in the relevant building or part of it.

Unlike Remediation Contribution Orders (see *CILL*, June 2024), the FTT is not required to ask itself whether such an order is "just and equitable".

Vista Tower (the "Building") is a detached 16-storey block in Stevenage, Hertfordshire. It is more than 45-metres high and accommodates 73 residential flats. It was constructed in the late 1950s/early 1960s and in 2015/2016 was converted from office to residential use by the then freeholder, Edgewater (Stevenage) Ltd ("Edgewater").

Between 2016 and 2017, Edgewater granted leases of each flat for terms of about 250 years. Under the leases, the landlord covenanted to maintain and repair the main structure of the Building including exterior walls and window frames.

The Grenfell Tower disaster took place on 14 June 2017. In July 2018, Grey GR Limited Partnership ("Grey GR") purchased the freehold of the building. The freehold was one of several residential buildings acquired by Grey GR as a portfolio of investments for the benefit of the Railpen Pension Fund.

In December 2018, the Building (Amendment) Regulations 2018 came into force, prohibiting the use of combustible material in external walls of buildings at least 18-metres high.

On 22 February 2019, Stevenage Borough Council (the "Council") wrote to Grey GR about the combustible core panels at the Building. This was followed up by a letter dated 8 March 2019 confirming the outcome of an inspection that identified combustible materials on the outside of the building. Further investigations of the UPVC curtain glazing system in the Building were undertaken.

In January 2020, the Consolidated Advice Note ("CAN") was published by the government to combine 22 guidance notes produced following the Grenfell Tower fire in June 2017.

In March 2020, the Building Safety Fund (the "BSF") was announced. The purpose of the BSF was to meet the cost of additional relevant fire safety risks where building owners were unwilling or unable to afford to do so. Guidance from the BSF identified that one of the objects of the BSF was to ensure that fire safety risks associated with cladding should be addressed quickly and proportionally and that cost recovery from those responsible for the installation of the cladding should be maximised.

In June 2020, Grey GR applied to the BSF for funding for works based on the CAN, which required the removal of all combustible material. During the remainder of 2020 and into 2021 Grey GR's consultants undertook investigations and surveys to determine the scope of remedial works.

In September 2020, the BSF notified Grey GR of eligibility for funding in respect of the remediation of UPVC spandrel panels/curtain glazing but not in respect of other proposed remedial works. During the course of 2021, Grey GR unsuccessfully attempted to obtain agreement from the BSF to fund a wider scope of remedial works.

On 10 January 2022, the government withdrew the CAN and on 31 January 2022, the BSI published a new building safety standard (PAS 9980:2022) ("PAS") offering a more nuanced approach to fire risks, meaning that entire replacement of the cladding was no longer necessary. As a result, further investigations were undertaken as to the appropriate scope of remedial work and in August 2022, a further application was made to the BSF for funding.

On 3 October 2022, the Secretary of State for Levelling Up, Housing and Communities (the "Secretary of State") sent a pre-action letter to Grey GR suggesting that it had been "recalcitrant" in undertaking the necessary remedial works and threatening to apply for a RO.

On 2 November 2022, the Secretary of State made that application to the FTT. By this time, Grey GR had withdrawn its original BSF application and re-submitted it by reference to PAS.

During the course of 2023, the FTT proceedings, including disclosure, were progressed and the procurement of the necessary remedial works were also progressed together with BSF funding. By

late 2023, the parties had agreed on the specification of the relevant defects and remedial works and the programme for carrying out those works, such that there was no need for expert evidence.

The parties remained in dispute as to whether, in those circumstances, an RO should be made and what the terms of such an order might be.

On 15 December 2023, Grey GR engaged a contractor pursuant to a JCT Design and Build contract to undertake the remedial works. The works commenced in January 2024 with a completion date of 15 September 2025. On 17 January 2024, Grey GR entered into a Grant Funding Agreement ("GFA") with the Department of Housing, Levelling Up and Communities (the "Department") and Homes England.

On 21 December 2023, Grey GR invited the Secretary of State to withdraw the application on the basis that Grey GR would commit to carrying out the remedial work within the time specified and that the parties would refrain from making any "besmirching or negative public statements about the other". Grey GR's offer was rejected on 18 January 2025 and the application was heard by the FTT on 25 and 26 March 2024.

At the hearing, the Secretary of State maintained the application for an RO, despite works having been commenced under a building contract with a completion date of September 2025, on the basis that there had been a lack of pace caused by Grey GR's insistence in obtaining funding prior to carrying out the works and the move from the CAN to PAS which had led to further delay. The Secretary of State relied on the fact that unlike Remediation Contribution Orders under section 124 of the 2022 Act or Building Liability Orders under section 130 of the 2022 Act, there was no requirement for the tribunal to be satisfied that the order as just and equitable. It was argued that this was a strong indicator that Parliament had intended that if the tribunal was satisfied that there were relevant defects then it must make an order. It was further argued that a RO would provide oversight in relation to the works which would be a comfort both to the Secretary of State and the leaseholders.

Grey GR took the position that the application had been issued prematurely as it was fully committed to carrying out

the work. The delays in securing funding and ascertaining the scope of the works required had mainly been due to the Department and Homes England. Grey GR suggested that a RO was akin to an order for specific performance and therefore such an order should not be made unless it was necessary or desirable to do so. In circumstances where contracts had been entered into both in relation to the remedial works and funding, Grey GR argued that the tribunal could not be satisfied that a RO was either necessary or desirable. Grey GR was also concerned that where a JCT contract had been entered into for the works, with its own mechanisms for extensions and disputes, a RO would place the tribunal in the unenviable position of being the third supervisor of the works.

It was therefore argued in the alternative that if the tribunal did make a RO then such an order should be subject to the JCT contract and the GFA to minimise overlap and confusion.

### Issues and findings

*Should an RO be made where remedial works had commenced under a building contract and funding had been granted?*

Yes, but the RO should be subject to the building contract and funding agreement.

### Commentary

In considering its powers to grant an RO, the tribunal accepted that an RO is a "novel remedy" and agreed that whilst it might appear to be similar to an order for specific performance, different considerations applied, with the focus on the remediation of life-threatening building safety defects in tall residential buildings.

The tribunal went on to say that if the pre-qualification criteria in section 123 of the 2022 Act applied, then they considered it likely that a tribunal would make an RO subject to the facts of each case.

In this case, the tribunal considered that there had been delay on both sides although the criticism aimed at Grey GR in relation to its application to the BSF was considered to be misplaced and, given the scale of Grey GR's pension fund portfolio and the cost of the works, it would have been impractical and unreasonable to expect Grey GR to forward fund the works. The tribunal drew a distinction with the situation in respect of Remediation

Contribution Orders, where landlords are expected to forward fund works.

The tribunal also noted that it would not wish to interfere with the building contract and GFA and any disputes about the works or funding which should be considered within those parameters first.

Notwithstanding, the tribunal made the RO. This seems a slightly surprising outcome given the comments made and summarised above. However, the decision was made on the basis that the focus of the 2022 Act is leaseholder protection. Fifty-seven of the leaseholders at Vista Tower had asked the tribunal to make the RO and they were not a party either to the building contract or the GFA. In such circumstances, the tribunal considered it appropriate to make the RO as a backstop to give reassurance. The tribunal emphasised that this was not a fault-based order. They did not wish the RO to get in the way of the arrangements put in place to carry out the remedial works. The RO was therefore made in terms that were subject to the building contract and the GFA and with a clear period of grace for any extensions of time agreed via those contracts.

The tribunal described this approach as a “practical approach” and it is clear how it can be seen as addressing not only the concerns raised by Grey GR but also those raised by the leaseholders. In practical terms, though it would be interesting to see what, if any, difference it makes to the completion of the remedial works or whether it is simply visible reassurance to leaseholders, reflective of the 2022 Act.

### Whether contract was signed – Whether contract was conditional

#### ***Ubhi Construction Ltd v Aspire Enterprises (UK) Ltd***

[2024] EWHC 1089 (TCC)

*In the Technology and Construction Court; Before Her Honour Judge Sarah Watson; Judgment delivered 9 May 2024*

#### **The facts**

On 5 February 2016, Ubhi Construction Ltd (“Ubhi”) entered into a JCT contract with Millenium Enterprises Ltd (“Millenium”) for a residential development in Ironbridge (the “Ironbridge Contract”). The Ironbridge Contract was signed by Mr Dhanda, who was a shareholder and recent former director of Millenium. Mr Singh was a

director and shareholder of Millenium. Mr Dhanda and Mr Singh were also associated with Aspire Enterprises (UK) Ltd (“Aspire”). Mr Dhanda and others had discussed with Ubhi a development at Willenhall to build houses and apartments.

On 31 May 2016, Ubhi sent Aspire a quotation for the building of 15 houses and 15 apartments at Willenhall in the sum of £2,913,875, followed by a revised quotation for 14 houses and 15 apartments in the sum of £2,626,444.

Ubhi claimed that it had entered into a JCT contract with Aspire for the construction of 14 houses at Willenhall on 19 August 2016 for the price of £1,398,375 (the “Contract”) and that Mr Dhanda signed the Contract on that date for Aspire. Aspire subsequently denied that it had entered into the Contract and in particular that Mr Dhanda did not execute the Contract on behalf of Aspire and that his signature was not written on the Contract by him or with his authority or the authority of Aspire.

In September 2016, Ubhi commenced site clearance and preliminary works. Aspire subsequently claimed that this work was carried out pursuant to an oral agreement made on 27 November 2015 under which Ubhi agreed to carry out such works for £30,000. The parties then corresponded for some time on various issues including the requirements of Aspire’s funders. However, on 31 October 2017, Aspire signed a contract with a different contractor for a lower price to carry out the development at Willenhall.

Aspire paid Ubhi £30,000. In addition, Ubhi had raised invoices for the period September 2016 to October 2017 totalling £206,350. Ubhi claimed payment of those invoices and loss of profit. Aspire denied liability on the basis that the Contract did not exist and the only contract in existence was the oral contract made in November 2015. Alternatively, Aspire argued that if the Contract had been signed by Mr Dhanda then it was conditional on Aspire securing approval to the development from its finance company, and no such approval was obtained.

#### **Issues and findings**

*Did Mr Dhanda sign the JCT Contract?*

Yes.

*Was the Contract conditional on funding?*

No.

### Commentary

Whilst this case turns mainly on its facts, it is an example of the care to be taken in the presentation of evidence to the court. Here, Aspire's witnesses consistently gave oral evidence which contradicted contemporaneous documents and documents that had been filed at Companies House. It was therefore little surprise in the circumstances that the judge rejected the credibility of the witness evidence provided by Aspire and found in Ubhi's favour.

### Insurance cover – Unexploded ordnance – Proximate cause of loss

#### *University of Exeter v Allianz Insurance plc*

[2023] EWCA Civ 1484

*In the Court of Appeal;  
Before Lord Justice Lewison, Lord Justice Coulson and Lord Justice Snowden;  
Judgment delivered 14 December 2023*

#### The facts

In 1942, a bomb was dropped by hostile German forces in Exeter. The bomb did not explode, and lay undiscovered until 2021 when it was unearthed during building works adjacent to the campus of the University of Exeter (the "University"). Bomb disposal experts were called in and they determined that the bomb should be exploded in situ as it could not be safely transported away. When the bomb was exploded it caused damage to some of the University's buildings in the immediate vicinity of the site.

On 1 April 2020, Allianz Insurance plc ("Allianz") had issued an insurance policy ("the Policy") to the University which covered physical damage to property and business interruption. The University subsequently made a claim to Allianz under the general insuring clause of the Policy. Allianz refused the claim, relying on general exclusion 2 of the Policy which excluded claims "occasioned by war".

The parties fell into dispute as to whether the Policy covered the claim and Allianz issued Part 8 proceedings in the Technology and Construction Court seeking a declaration to the effect that it was entitled to decline the University's claim under the Policy on the basis that the loss claimed was occasioned by war.

In considering whether the loss was or was not occasioned by war the court had to consider the proximate cause of the loss. Allianz argued that the proximate cause of the loss was the dropping of the bomb, which it was accepted by the parties was an act of war. The University argued that the proximate cause was the deliberate act of the bomb disposal team in detonating the bomb, which was not an act of war.

The judge at first instance found in favour of Allianz, determining that the dropping of the bomb was the proximate cause of the loss, alternatively that it was a proximate cause, equally or near equally concurrent with the detonation of the bomb and, following established principles, the exclusion would still apply in such circumstances. The University appealed.

#### Issues and findings

*What was the proximate cause of the loss?*

The proximate cause of the loss was the dropping of the bomb. However, the judge had also been correct in his alternative analysis.

#### Commentary

In this case, the Court of Appeal robustly upheld the decision of the judge at first instance. The Court of Appeal did not consider the passage of time between the dropping of the bomb and the detonation to be relevant and found that the dropping of the bomb was the proximate cause of the loss, alternatively a concurrent proximate cause of the loss. Accordingly, and in line with established principles, the exclusion under the policy was applicable and the University's claim under the policy was rejected. ■

## The Fenwick Elliott Blog:

### Late payments – you're really on thin ice now

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 September 2024, **Paul Smylie** wrote about a Court of Appeal case dealing with termination under the JCT Form.

#### ***Providence Building Services Ltd v Hexagon Housing Association Ltd*** [2024] EWCA Civ 962

This recent decision should sound as a stark warning to employers under JCT contracts over the perils of failing to make payments on time. Overturning the first instance decision, the Court of Appeal held that the Contractor was entitled to terminate its employment based on just two late payments, each of which was rectified within 14 days.

#### **Background**

Hexagon Housing Association Limited ("Hexagon") engaged Providence Building Services Limited ("Providence") to construct a number of buildings under a contract (the "Contract") incorporating the 2016 JCT Design and Build Contract as amended by the parties.

Clause 8.9 of the Contract set out the circumstances in which Hexagon could terminate its employment under the Contract as follows:

*"8.9.1 If the Employer:*

- 1. does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 and/or any VAT properly chargeable on the that amount...*

*the Contractor may give to the Employer a notice specifying the default or defaults (a 'specified' default or defaults).*

- 8.9.3 If a specified default or a specified suspension event continues for 28 days from the receipt of the notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that 28 day period by a further notice to the Employer, terminate the Contractor's employment under this Contract.*

- 8.9.4 If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not):*

- .1 the Employer repeats a specified default;*

*then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."*

In December 2022, Providence issued a notice under clause 8.9.1 in respect of Hexagon's failure to pay the amount specified under Employer's Agent Payment Notice 27 by the final date for payment. Hexagon paid the amount due to Providence before the 28-day period under clause 8.9.3 had expired.

In May 2023, Hexagon failed to pay the amount specified under Employer's Agent Payment Notice 32 by the final date for payment. Providence gave notice that Hexagon had repeated a specified default and stated that it had terminated its employment under clause 8.9.4 of the Contract.

Hexagon paid the amount due under Payment Notice 32 and asserted that Providence had repudiated the Contract. Hexagon referred the dispute to adjudication. The adjudicator found in favour of Hexagon and so Providence commenced Part 8 proceedings regarding the operation of clause 8.9.4.

#### **First instance decision**

At first instance, the Court held that the right to give notice under clause 8.9.4 only arose where a notice could have been given under clause 8.9.3 but the Contractor had decided not to do so. Accordingly, if the first specified default had been remedied within the 28 day period under clause 8.9.3, it could not be relied upon as the basis for giving a notice under clause 8.9.4.

#### **Appeal**

The Court of Appeal disagreed and held that the words "for any reason" in clause 8.9.4 were wide enough to cover cases where the reason that a notice had not been given under clause 8.9.3 was because the right to give that notice had never arisen. Accordingly, Providence was entitled to give notice under clause 8.9.4 of the Contract and terminate its employment.

The Court of Appeal acknowledged that this left Employers on thin ice in respect of late payments and would potentially allow a Contractor to terminate for repeated default even where either the underpayment was very small or the delay was very short. However, the Court of Appeal considered this was a commercially acceptable allocation of risk, especially given the potential for a serial defaulter to escape significant consequences if they managed to end their defaults within the 28 day period.

Given the significant consequences of purporting to terminate a contract without the right to do so, it is crucial that parties understand the extent of their contractual rights. Save for the periods of time, clause 8.9.4 was unamended from JCT standard form wording. Accordingly, this judgment provides helpful guidance which should have broad application. Employers may be alarmed by how little leeway they are afforded in respect of late payments, whilst Contractors will likely observe that this should deter serial late payers. However, certainty over the contractual rights should benefit all.

In reaching its decision, the Court of Appeal cited two judgments concerning the 1998 JCT standard form in which a similar conclusion had been reached. The Court of Appeal cautioned against relying on the development of standard form wording from previous versions as an aid to interpretation but noted that there are some instances where an amendment can be confidently identified as due to a particular judgment, change in legislation or publicised event.

It is therefore notable that the 2024 version of the JCT standard form has retained the same wording in clause 8.9. It is not clear if this was because the JCT agreed with the first instance decision or because the first instance decision was published too late for the JCT to respond. In any event, the Court of Appeal noted that the drafting of clause 8.9.4 could have been better and so this appears to have been a missed opportunity for the JCT to clarify the intention of the standard form wording. ■

## In memory of Jon Miller

As you may know, **Jon Miller** passed away peacefully early on the morning of Monday 2nd September after a very short illness. We are all devastated at his untimely passing. He has left a huge hole in our hearts. His passion, determination and good humour were infectious and are much missed.

Jon affected significant change in the construction industry at some of its most transformative moments, including during the passing of the Housing Grants, Construction and Regeneration Act 1996, when he lobbied Government on behalf of the construction industry, and more recently during the COVID-19 pandemic, when he worked with the Construction Leadership Council providing guidance for contractors.

He also provided a series of notes<sup>1</sup> updating everyone on the latest developments and impact COVID-19 was having on construction contracts. Being Jon, they were packed with sound practical advice. In his memory, we set out his Note from May 2020.

1. Jon had written earlier Notes, which covered notices and force majeure. These can be found here: <https://www.fenwickelliott.com/research-insight/articles-papers/covid-19>
2. Construction News website, 6 May 2020
3. Construction News Website 6 May 2020
4. i.e. under the JCT D & B 2016, and there are real issues as to whether there has been change in law or statutory requirements at all
5. Jon was involved in drafting this Guidance

### Coronavirus/COVID-19 and Construction Contracts – Recent Developments and Further Actions

*Originally published 11 May 2020.*

This note sets out the most recent developments the construction industry has adopted in trying to deal with the Coronavirus/COVID-19 outbreak, and suggests what actions need to be taken including:

- The impact of the Construction Leadership Counsel's ("CLC") Site Operating Procedures Version 3 ("SOP"), which has become the prevalent standard for dealing with COVID-19 on construction sites.
- What is happening with various projects re the grant of extensions of time, loss and expense, suspension, etc.?
- The recent document issued by the CLC's COVID-19 Contractual Best Practice Guidance ("Best Practice Guidance") which gives recommendations as to what everyone in the construction industry should be doing at the moment to avoid disputes over COVID-19.

Please bear in mind the observations made about the rules governing force majeure and construction contracts, the need to give notices, etc., mentioned in my previous notes. It is important that you read your contract and protect your position.

#### What is happening at the moment?

*"Where it is not possible" / "Where it is possible"*

The above phrases are being widely used in government communications aimed at the workplace, and construction industry advice. Employers, contractors and subcontractors who are looking for a clear set of rules telling them what to do and have criticised the use of these phrases, as almost anything is "possible" with sufficient time and money. One thing however is clear, it is impossible to produce a set of detailed rules which could govern a large number of different building operations.

#### The SOP

Against this backdrop the SOP has essentially become the benchmark as to how sites should operate in the new post-COVID-19 world. The SOP covers

areas such as, how to travel to and from site (i.e. public transport should be avoided, if operatives drive to site in their own transport with others they should keep the windows open etc), hand washing (when entering and leaving the site), toilet facilities (an attendant may be necessary to reduce overcrowding...) etc.

When dealing with construction operations significantly the SOP does not say work should stop if operatives cannot keep at least 2 metres from each other. According to the SOP, *"Where it is not possible"* to keep to the 2-metre distancing rule, *"...you should consider whether the activity needs to continue for the site to continue to operate, and, if so, take all mitigating actions possible to reduce the risk of transmission"*. In these circumstances a hierarchy of controls are recommended:

- Can the risk be eliminated completely? (i.e. does it need to be done now or can it be done more safely in the future)
- Reducing the risk – reducing the number of people involved – e.g. avoiding the use of the lift (which will be very interesting in high rise developments).
- Isolating – keeping small teams together and separate from other operatives.
- Control – limiting face to face working to 15 minutes or less.
- PPE – whilst not used when the 2 metre rule is in place PPE could be relevant where this rule cannot be adhered to.

The SOP is guidance, and does not have the force of law. Indeed according to a Construction News survey 1 in 5 construction workers on site still believe there has been little or no attempt to maintain the 2 metre distancing rule.<sup>2</sup> Nevertheless the HSE are almost certainly going to rely on the SOP when deciding if a site is operating safely or not, which ultimately could lead to enforcement action – apparently the HSE received more than 4,500 reports relating to COVID-19 between 9 March until the first week of May.<sup>3</sup>

#### **What should I do if the SOP is not being followed?**

Highlight the failure in writing to the relevant Sub Contractor, Principal Contractor and the Employer who all have duties to not only their employees but

also those who might be impacted by the works under the Health and Safety at Work Act/CDM Regulations. Bearing in mind though there is no absolute requirement that everyone must be at least 2m away from each other at all times.

Refusing to work can have serious implications commercially speaking and will nearly always amount to a breach of contract, unless there is clear justification for the refusal. As always gather together as much evidence as possible via photographs, emails written at the time etc highlighting the issues. As an adjudicator it never fails to surprise me when someone complains of a significant event on site, but failed to even mention it in an email to anyone.

#### **Extensions of time and money**

A significant number of notices requesting an extension of time, and in some cases loss and expense have been issued. Many of the notices are relying on a wide range of reasons, not only force majeure but also changes in law and statutory requirements<sup>4</sup>, the issue of instructions in order to justify more time, and sometimes money.

However the small survey I conducted within the office, covered around 40 – 50 projects and it appears to be that for some small commercial/residential developments employers and contractors alike have agreed to suspend the work with some form of agreement on financial terms. The same projects are now looking at what can be done to re-open. This however appears to be the exception.

Overall very few extensions of time let alone anything else have been dealt with. To some extent this may be quite rightly due to Employers, Contractors, Consultants etc all directing their efforts as to how they can proceed in light of the current restrictions, and particularly the SOP. However, to quote a leading developer who spoke to me, many Employers, Contractors etc are "kicking the tin can down the road". Essentially the question as to whether even an extension of time should be granted is not being answered. The common response is to simply ask what "best endeavours" are being used to mitigate the delay?

A senior representative of a large firm of consultants pointed out that many consultants are not entirely sure what to do with an extension of time claim based

upon COVID-19? As mentioned before there are no real English cases as to whether COVID-19 would constitute *"force majeure"* under the JCT contract (although I believe that it would), and faced with this uncertainty some consultants are not entirely sure how they should react.

### Records, Records and Records (again)

What is becoming apparent is that, with the parties' energies being directed as to how they can safely operate on site, very little attention is being paid to record keeping as to what the impact of the COVID-19 pandemic actually is on the Works. Records are vital for establishing whether the contractor is entitled to an extension of time (and if applicable) and any loss and expense.

We have been recommending a daily narrative of what has happened on site, the number of operatives, the areas where they are working, and the reason for any shortcomings (e.g. operatives who have to self-isolate). This can even be done in the form of daywork sheets/daily allocation sheets, provided they include the details and could prove very useful in the future.

### CLC Guidance

Faced with the potential for disputes that may keep the legal profession busy for years the CLC has recently issued the Best Practice Guidance<sup>5</sup> in an attempt to avoid the intransigence which often blights the construction industry. The document also contains sample notices to be given for claiming an extension of time for COVID-19 under a JCT and NEC contract, and an explanatory note on how the notices should operate.

The Best Practice Guidance recognises that the parties need to protect their position by issuing notices, and I would expect the relevant notices to be given already under most standard form building contracts, but this is not enough.

The Best Practice Guidance then goes further by encouraging the parties to meet and discuss the problems that they are inevitably facing on site, and the commercial issues involved, and gives the precedent for a *"Without Prejudice Subject to Contract"* approach whereby the parties should be able to discuss the issues faced more openly without fear of what is being said being used against

them in the future. The Best Practice Guidance even explains what is meant by the terms *"without prejudice"* and *"subject to contract"* and contains a suggested agenda for any *"without prejudice and subject to contract meetings"*.

Whilst the SOP produced by the CLC may have turned into the *"go to"* document for operating on site, it remains to be seen whether the Best Practice Guidance will have anything like the same impact. I have to say that my experience so far is that everybody is rather reluctant to discuss time and money, but hopefully the Best Practice Guidance will give the encouragement and tools for this to happen in at least some cases. ■





*In memory of*

**Jon Miller**

1 August 1962 – 2 September 2024

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