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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Applications for Payment: requirements
Netomnia Ltd v MJ Quinn Integrated Services Ltd
[2026] EWHC 1824 (TCC)

Netomnia was the operator of a fibre-optic network; MJQ was engaged in the construction and installation of the cabling and related infrastructure for Netomnia's network. The parties entered into a framework agreement (the "MSA") under which Netomnia was able to call off the services of MJQ to carry out works on the network.

The MSA provided for a system of interim payments. On 5 February 2026, MJQ sent an application for payment (the "AFP") in the sum of £3,770.84. This was one of 168 applications for payment which were sent on that day in a similar format, in sums totalling just over £4.717 million. The AFP gave the reference of Work Order W0 0079, but it contained neither a purchase order number nor a relevant polygon identification number (Polygon ID) or relevant feature identification number (Feature ID). As a consequence, Netomnia said that the AFP was invalid.

An adjudicator disagreed and, holding that the payment notice which had been served in response was invalid by reason of being late, awarded MJQ £3.7 million. Netomnia issued Part 8 proceedings on the question of the validity of the AFP.

Referring to the decision of Smith J in *Advance JV v Enisca Ltd* (see *Dispatch*, Issue 264), Eyre J said that, in order "*to qualify as a valid notice, any payment notice must comply with the statutory (and, if more restrictive, the contractual) requirements in substance and form*".

Netomnia said that the AFP did not comply with the requirements of the MSA and was accordingly not capable of being a payment notice notifying that sum as being due for the purposes of section 110B(4) of the HGCRA. Clause 6.5 of the MSA provided that MJQ should provide an invoice:

- 6.5.4 "*accompanied by such documentation and other information with respect to the invoice as may reasonably be required in order to verify the accuracy of the invoice*"; and
- 6.5.5 referencing the corresponding purchase order.

The failure to include the relevant Polygon ID and Feature ID meant that it was not accompanied by information which was reasonably required to verify its accuracy, as per clause 6.5.4. Further, the absence of the purchase order number meant that the requirements of clause 6.5.5 were not satisfied. Eyre J considered that the nature and structure of the arrangements underlying the MSA were of particular significance. These included:

- A Polygon: a collection of premises within a geographically defined area. There were 12,396 polygons in Netomnia's network; and
- Features: the particular parts of the infrastructure to be provided in a polygon. By way of example, the Aintree Exchange contained 33,104 features.

Each polygon and each feature had a unique ID. Works were called off from the MSA by means of work orders using the template appended to the MSA. The way the purchase order system was meant to work meant that it was always possible to identify the polygon where the relevant works were to be or had been performed.

MJQ said that the AFP provided all the information that was reasonably required. The Work Order related to a single polygon. It identified the Work Order. It also gave the location and then set out the details of how the sum claimed was calculated. The AFP only sought payment under two headings: permits and indexation. Further, the amounts claimed for indexation were calculated by way of an uplift to sums which had already been paid. Netomnia had therefore already accepted that the items of work in question had been completed, and nothing would be gained by providing the relevant Feature IDs.

The judge noted that if the AFP had been standing entirely alone, and if there had been only a very limited number of work orders, those were points that might have had some force. However, it was necessary to have regard to the overall context in which clause 6.5.4 was operating. The issue of what information was reasonably required had to be seen in that context. With that in mind, it was apparent that the AFP did not provide the information which was reasonably required to verify the accuracy of the sums claimed. The judge highlighted that:

1. The MSA related to a nationwide operation, with other contractors as well as MJQ. The work done by MJQ related to multiple polygons and numerous features.
2. There were many work orders, in excess of 200, and most of these related to more than one polygon. This meant that searching against a work order number would not enable Netomnia to identify the polygon to which the sums claimed related and so Netomnia would not know whether the sums claimed were due.
3. There were numerous applications for payment, at least some of which were for low value amounts, and it was significant that Netomnia had to respond to the AFP quickly and issue a payment notice within five days of the due date.
4. Netomnia's systems were set up in such a way that the Feature IDs were used to identify the relevant polygon, and then the Polygon ID was used to identify the relevant purchase order. The purchase order would then be used to authorise payment. In most cases, a search against the work order would not, without more, have led to identification of the items in question.

Netomnia was right to say that it was entitled to require the information which would normally be necessary to verify the sums claimed. MJQ knew the relevant Polygon ID for the permits and the Feature IDs for the sums to which the indexation uplift was being applied. Therefore, MJQ could have provided this information when submitting the AFP. It was information which was reasonably required to verify the AFP, and by referring solely to the Work Order, the AFP did not satisfy the requirements of clause 6.5.4.

Resisting a bond call

TTSJV WLL & Ors v BapCo Refining BSC

[2026] EWHC 2047 (TCC)

TTSJV sought an injunction to require BapCo to suspend its demand on a performance guarantee issued by HSBC Bank Middle East Ltd (in the sum of US$484,406,323) and to restrain BapCo from making any further demand pending further order of the court or of any emergency arbitrator that might be appointed by the LCIA.

BapCo had entered into an EPC contract with TTSJV, a consortium of companies from the USA, Italy, Spain and the Republic of Korea, to complete a modernisation programme to upgrade BapCo's existing oil refinery in Bahrain. The contract was governed by the laws of England and Wales. Any dispute was to be referred to binding arbitration under the LCIA Rules, with the seat of the arbitration being London.

TTSJV said that the works were substantially complete, but the parties were in dispute as to whether the JV was entitled to an extension of time. BapCo was claiming liquidated and ascertained damages ("LADs") in the sum of US$484,406,323, being the contractual cap on such damages, calculated as 10% of the adjusted contract price.

BapCo had rejected TTSJV's claims for an extension of time and, on 18 May 2026, formally demanded payment of the LADs. On 21 May 2026, BapCo made a call on the performance guarantee. TTSJV asked the LCIA to appoint an emergency arbitrator but was concerned that, if the call was not suspended, HSBC would be likely to pay some or all of the sum demanded before Eid, which commenced on Monday, 25 May and before any emergency arbitrator could be appointed.

Under section 44 of the Arbitration Act 1996, the court may exercise its powers in support of arbitral proceedings. Here, given the terms of the bond, Pepperall J considered that there were good grounds for believing that, without injunctive relief, funds might be released before this application could be heard. Even though the LCIA has developed procedures for the appointment of an emergency arbitrator in cases of exceptional urgency, the judge was satisfied that there was a very real prospect that an emergency arbitrator might not be appointed and be practically able to grant effective relief before the funds were released. Any relief granted by the court would have been on a short-term basis to "*hold the ring*" until the emergency arbitrator could act.

The judge first had to decide what was the appropriate test to adopt. Was it that the court can grant injunctive relief to prevent the beneficiary of a bond from making a call where there was a strongly arguable case that the beneficiary was precluded from making such a call? Having considered the authorities, the judge held that relief could only be granted if TTSJV could clearly establish that BapCo was precluded from making the call, in this case by the terms of the parties' contract. In particular, Pepperall J highlighted the decision of Ramsey J in *Permasteelisa Japan KK v Bouyguesstroi & Banca Intesa SpA* [2007] EWHC 3508 (TCC):

> *"... a court might grant an injunction where there is an express term restricting the circumstances in which a party can draw on a letter of credit and where it is positively established that the party was not entitled to draw down, the same will not apply where there is only a serious, arguable case to that effect. Otherwise, the commercial effectiveness of letters of credit would be eroded ...*
>
> *If those principles are applied here, then I consider that the court should not intervene ... no case of fraud has been made out and there is only a seriously arguable case that there has been a breach of the contractual requirements under clause 20.2.1, which form preconditions to the call of the Bond."*

TTSJV sought to resist the call on the performance bond on three grounds:

1. that the LADs clause amounted to a penalty which could not be enforced by way of a call on the performance bond;
2. that the call on the performance bond did not comply with the formal requirements under the bond; and
3. that the delays LADs claimed were not due and payable.

The judge rejected all three.

Clause 12.5 of the EPC contract permitted BapCo to use the works prior to take over and to retain any revenue generated by operation of the plant. The contract did not, however, contain any corresponding clause adjusting the delay LADs, with the consequence that BapCo could operate the plant, retain the revenue generated, and still claim for full LADs. TTSJV suggested that this gave BapCo an unjustified windfall.

BapCo disagreed. This was not an entirely new plant but a contract for the modernisation of an existing facility, such that some production prior to completion was not surprising. Further, the parties had already agreed that BapCo had an accrued entitlement to delay damages of US$100 million.

Pepperall J said that there was a strong initial presumption against finding that the carefully negotiated provisions for LADs between commercially sophisticated parties did amount to an unenforceable penalty. The most that could be said was that TTSJV had established a potentially arguable case that the LADs might be penal for failure to reflect the partial take-over of the facility. A full analysis was needed to consider these issues. Such an assessment could not be finally made on an urgent interim injunction application heard at very short notice with limited evidence served only on one side.

TTSJV also argued that the demand was not compliant with the terms of the guarantee. Clause 11 incorporated the Uniform Rules for Demand Guarantees (2010 revision) and TTSJV said that, in breach of article 15(a), the demand was not supported by a statement by BapCo indicating in what respect TTSJV was in breach of its obligations.

BapCo said that the demand was so supported and, further, the guarantee required any demand to be substantially in the form of an attached exhibit. This had a blank space for details of the EPC contract, but no equivalent space for details of its claims in respect of any breach of contract. In the event of conflict, the terms of the guarantee prevailed over the uniform rules.

Finally, TTSJV argued that, on the proper construction of the contract, LADs were only payable to the extent that the failure to achieve Provisional Acceptance was not excused by Relevant Events for which TTSJV was entitled to an extension of time. BapCo had wrongly rejected its extension of time claim in a determination made on 3 May 2026.

However, there was no clause that provided that, unless or until the extension of time claim was resolved, LADs would not be due and owing. Further, under sub-clause 3.5, each party was required to give effect to any determination, even where a notice of dissatisfaction had been served.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world. Dispatch is a newsletter and does not provide legal advice.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN